

Commissioning Committee itself had not certified the witnessing of power generation and injection by all the 26 WTGs of the 50 MW project of Petitioner. The claim made by the Petitioner is contrary to minutes of the meeting.

- k) It is incumbent for the Petitioner to demonstrate that independent turbines are erected, installed in all respects and generating power on a regular basis. The 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) is the evidence of the erection of the individual WTG. The above is essential since in the case of a Wind Power Project, each WTG operates as an individual generating unit which in aggregate forms the entire generation station. There has been no fulfilment of the above requirements during the site visit on 03.01.2020 by the Commissioning Committee. The mere recording of energy in aggregate at sub-station of PGCIL does not evidence that all the generating units have been duly commissioned and the generated power is flowing which is the essence of the commissioning of the generating unit.
- l) The telemetry integration was completed on 05.03.2020. Therefore, it was only on 05.03.2020, that the Petitioner fulfilled the criteria for being declared as commissioned in terms of the Guidelines, RfS, PPA and the Commissioning Procedure.
- m) On submission of all the documents and compliance of all the requirements by the Petitioner as per the Commissioning Procedure, SECI issued the Commissioning cum COD Certificate on 06.03.2020.

Proposition II: The petitioner is wrongly claiming alternative plea of delay in commissioning of the project from 03.01.2020 to 05.03.2020 on account of force majeure

- n) The Petitioner is wrongly claiming extension of SCoD for 50 MW Wind Project of the Petitioner from 03.01.2020 till 05.03.2020 on alleged grounds of force majeure events namely:
 - (i) Delay in physical verification of commissioning during first and second visit by the Commissioning Committee due to factors beyond the control of the Petitioner, namely, Right of Way issues and agitation by the local villagers and
 - (ii) Delay in adoption of Tariff.
- o) The Commissioning Committee which visited site on 03.01.2020 did not witness any RoW issues or otherwise any local protest. The minutes of the Commissioning Committee's visit

on 03.01.2020-04.01.2020 duly signed by the Petitioner's representative and other members of the Committee do not record any such obstruction being faced by them except that the Petitioner did not show the balance 7 WTGs. The Petitioner did not provide any Notice of Force Majeure as required by Article 11.5.2 of the PPA, which is a pre-requisite for Petitioner's entitlement to claim Force Majeure, either on 19.12.2019 or 03.01.2020-04.01.2020 to claim Force Majeure, was given by the Petitioner.

- p) The Petitioner has alleged that SECI has delayed in obtaining Order from Appropriate Commission for adoption of tariff and that in absence of the tariff adoption Order, no lender was willing to come forward. The Commission passed the Order on 03.12.2019 in Petition No.369/AT/2019 filed by SECI, adopting the tariff of the projects of WPDs including the Petitioner under Wind Tranche-II Scheme. The Petitioner was a party in the proceedings in the above Petition. At no point of time, the Petitioner raised any issue in the said proceedings regarding the alleged delay as claimed in the Petition filed. The Petitioner had raised the issue of delay in tariff adoption for seeking extension of time, for the first time, (clearly as an after-thought) only by its letter dated 13.04.2020 i.e. after more than 27 months from the date of execution of the PPA dated 29.12.2017 and after the Petitioner had commissioned the 50 MW Power Project on 05.03.2020. The passing of Tariff Adoption Order on 03.12.2019 did not in any manner affect the implementation of the project by the Petitioner and is therefore not Force Majeure event within the scope of Article 11 of the PPA.

Written Submissions of the Petitioner:

12. The Petitioner has filed Written Statement on 13.07.2020 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, the Petitioner has submitted as under:

The Petitioner had complied with the Commissioning Parameters on 03.01.2020 itself and the Project stood Commissioned on 03.01.2020

- a) As per the definition of COD and commissioning provided in the PPA, the following twin test has to be satisfied for the Project is declared as “*Commissioned*”.
- a. Whether all the equipments as per rated capacity have been installed; and
 - b. Whether the energy has flown into the grid.

- b) The Petitioner had issued an advance notice of synchronization under Article 5.1.1 of the PPA that it intends to commission the Project around 27.11. 2019. GEDA had also provided the GEDA Id on 06.12.2019 that was marked on each WTGs.
- c) Central Electricity Authority had granted approval for energisation of Electrical Installations on 05.09.2019 and to all 26 WTGs, 33 kV USS and Associated 33 kV lines on 15.11,2019 after the physical inspection of all the associated electrical system on 03-04.09.2019 and the physical inspection of WTGs on 13.11.2019 as recorded under the said approvals. From the aforesaid approvals granted by the CEA, it is evident that the equipments as per rated Project Capacity, were installed, as the CEA had certified them after duly inspecting the entire project equipments.
- d) Commissioning Committee in the minutes of meeting dated 03-04.01.2020 stated that it had witnessed and recorded energy meter readings at 33 kV Pooling sub-station on 03.01.2020, which clearly established that the energy had flown into the grid from the WTGs of the Petitioner. Therefore, the criteria for Commissioning as per the definition provided in the PPA was met on 03.01.2020 itself.
- e) As far as physical verification of few WTGs is concerned, it has no relevance once the same has been duly examined physically by the competent authority i.e. CEA on 03.09.2019 and 04.09.2019 for the electrical systems and on 13.11.2019 for the WTGs and after being satisfied with the installation, the energisation approval was granted by the CEA.

Alternative Plea – the Petitioner has substantially complied with the Commissioning Procedure dated 04.05.2018

- f) Even if the Commissioning Procedure dated 04.05.2018 unilaterally notified by SECI on 04.05.2018 is to be followed, the Petitioner submits that it has substantially complied with the same as on 03.01.2020 itself.
- g) SECI only has two objections with respect to the Commissioning of the Project on 03.01.2020 that the SCADA was not installed and that the physical verification of the WTGs was not completed.
- h) The definition of the commissioning in Clause A5 and criteria of commissioning in Clause B2 of the 2018 Commissioning Procedure were met on 03.01.2020 as all the necessary equipments had been installed and the energy had flown into the grid.
- i) Clause B6 of the 2018 Commissioning Procedure provides that the Commissioning Committee comprising of the officials of GEDA, CTU and the Petitioner shall visit the

Project site to witness the commissioning of the Project. As per the said procedure, only the members of the Commissioning Committee, comprising of the officials of SECI, GEDA, CTU and the Petitioner, were entitled to visit the Project site together and not the officials of SECI individually as per their whims and fancies.

- j) The said clause is only directory and not mandatory because if the said clause were mandatory, SECI would have insisted on a site visit by the Commissioning Committee in December 2019 instead of just its officials visiting the Project site. Moreover, 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. The Petitioner had even complied with the 2018 Commissioning Procedure unilaterally notified by the SECI, except for physical verification of the WTGs, which as per the Petitioner has no relevance once same has been duly examined physically by the competent authority i.e. CEA on 03.09.2019 and 04.09. 2019, for electrical systems and on 13.11.2019 for WTGs and after being satisfied with the installation, energisation approval was granted by the CEA.

SECI's stand on WTG SCADA and Telemetry Data is Incorrect

- k) The WTG SCADA validation is not a pre-requisite for “*Commissioning*” at all. Even under the 2018 Commissioning Procedure, WTG SCADA validation was to be established post commissioning as per the requirement of power scheduling. Similarly, communication of telemetry data by the RLDC was the requirement only for commencing the scheduling of power from the Project and is not a pre-requisite for commissioning of the Project even under the 2018 Commissioning Procedure.

Force Majeure

- l) If there was no force majeure event, as has been claimed by SECI, the officials of SECI could have gone by themselves, without the Petitioner’s assistance, to verify the WTGs physically as they already had the locations of all the WTGs as have been stated by SECI in its Reply. However, since the officials of SECI failed to go to the location where the WTGs were installed shows the occurrence and the persistence of the aforesaid force majeure events. Presently, it is no longer SECI’s own policy that a project can be considered commissioned only after a physical site visit. Therefore, refusal of SECI to consider that the Project stood commissioned on 03.01.2020 as the

physical verification could not be completed is therefore frivolous and nothing but an eye wash.

Delay in Adoption of Tariff

- m) SECI had filed the Petition for adoption of tariff only in the year 2019 when the initial SCoD of the Project was 03.05.2019. 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 SCOD 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. However, despite the 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. Now, instead of appreciating the Petitioner for the same, the SECI is trying to hold the same against it.

Liquidated Damages can be levied only if actual loss is suffered by a party

- n) It is settled law as per the judgments of the Hon'ble Supreme Court that even in case of breach of contract, the courts will award liquidated damages only when a party proves that it has suffered actual loss or damage because of the said breach. Reliance is placed on the Hon'ble Supreme Court judgment in ***Kailash Nath Associates vs. Delhi Development Authority and Anr. (2015) 4 SCC 136***. In the present case, SECI has never contended nor has it been able to prove that it has suffered any loss or damage on account of alleged delay in commissioning of the Project. Therefore, it shall not be entitled to any liquidated damages.

Analysis and Decision

13. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records.
14. The primary issues that arise for consideration before the Commission in the present matter are as under:

Issue No. 1 : Whether the Petitioner had commissioned the Project on 03.01.2020 and the consequential reliefs can be granted?

Issue No. 2: *Whether the Scheduled Date of commissioning of the project needs to be extended to 05.03.2020 without the levy of the Liquidated Damages by SECI, on account of alleged force majeure event(s) by the Petitioner?*

Issue No. 3: *Whether SECI can be directed to refund the Liquidated Damages of Rs. 3,44,44,444 (Rs. Three Crores Forty Four Lacs Forty Four Thousand Four Hundred Forty Four Only) imposed upon the Petitioner?*

15. We now take issues one by one for discussion:

Issue No. 1 : *Whether the Petitioner had commissioned the Project on 03.01.2020 and the consequential reliefs can be granted?*

Issue No. 2: *Whether the Scheduled Date of commissioning of the project needs to be extended to 05.03.2020 without the levy of the Liquidated Damages by SECI, on account of alleged force majeure event(s) by the Petitioner?*

16. Since Issue No. 1 & Issue No. 2 are based on same set of facts hence the same are being taken together for discussion. The Petitioner has submitted that as per PPA dated 29.12.2017, the SCoD of the project was 03.05.2019 which was subsequently extended by the SECI to 03.01.2020 on account of delay in operationalisation of Long-Term Access (LTA) by the Central Transmission Utility (CTU). Briefly, the Petitioner has alleged that:

- (i) it had met all the formalities and parameters required for Commissioning of the Project on 03.01.2020, and that it had achieved the Commissioning of the project in terms of the PPA on the 03.01.2020 itself and accordingly it may be declared that the Project was commissioned on 03.01.2020.
- (ii) *Alternatively*, the delay in the physical verification of the project on account of certain RoW issues, the agitation by the local villagers and delay in Adoption of Tariff constitutes force majeure events covered under Article 11.7.1 (b) of the PPA and accordingly the SCoD of the project may be extended under Article 4.5.1 of the PPA.

17. The Commission notes that the relevant provisions of the *Guidelines* are as under:

'Project Commissioning' *the Project will be considered as commissioned if all equipments as per rated capacity has been installed and energy has flown into grid, in line with the Commissioning procedures defined in the RfS document*

3.14 Commissioning

Commissioning Schedule and Penalty for Delay in Commissioning

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

3.16 Commercial Operation Date

The Commercial Operation Date (COD) shall be considered as the actual date of commissioning of the project as declared by the SNA/Committee/individual/any other entity authorized by SECI. COD will be declared only when the project developer has commissioned 50 MW capacity or 50% of the allotted project whichever is higher. PPA tenure will be counted from COD irrespective of the date of commissioning of the balance capacity

The following two milestone dates for commissioning may therefore be observed and may fall on separate dates:

***Inter connection with Grid:** This may be provided by the PGCIL/State Transmission Company on the request of the WPD, to facilitate testing and allow flow of power generated into the grid to avoid wastage of Power.*

***The Commissioning of Project:** This will be on a date, when the Project meets the criteria defined for project commissioning. SECI may authorize any individual or committee or organization to declare the project commissioned on site.....”*

18. The relevant provisions of RfS are as under:

3.17. Commissioning

*The Commissioning of the Projects shall be carried out by the WPDs in line with the Procedure elaborated in the PPA document (Commissioning Procedure at Annexure-A and Appendix-A-1 are for reference). SECI may authorize any individual, committee, or organization to **witness and validate the commissioning procedure on site.***

Commissioning Procedure

*Commissioning Procedure for the Projects selected under the RfS **shall be intimated by SECI in due course of time.***

3.17. Commissioning

The Commissioning of the Projects shall be carried out by the WPDs in line with the Procedure elaborated in the PPA document (Commissioning Procedure at Annexure-A and Appendix-A-1 are for reference). SECI may authorize any individual, committee, or organization to witness and validate the commissioning procedure on site. Commissioning certificates shall be issued by the State Nodal Agency or SECI after successful commissioning.

B. Commissioning Schedule and Liquidated Damages not amounting to Penalty for delay in Commissioning:

The Project shall be fully commissioned within 18 months from date of issuance of Letter of Award.... In this regard, a **duly constituted committee will physically inspect and certify successful commissioning of the Project.** In case of failure to achieve this milestone, SECI shall encash the Performance Bank Guarantee (PBG) in the following manner:

19. The relevant provisions of PPA are as under:

‘Commissioning’ The Project will be considered as commissioned if all equipment as per rated Project Capacity has been installed and energy has flown into grid, in line with the Commissioning procedures defined in the Guidelines/PPA. ”

“Commercial Operation Date” shall mean the actual date of commercial operation/commissioning of the project as declared by the State Nodal Agency (SNA)/Committee/individual/any other entity authorized by SECI. COD will be declared only when the project developer has commissioned 50 MW capacity or 50% of the allotted project whichever is higher. PPA tenure will be counted from COD irrespective of the date of commissioning of the balance capacity;

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

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

ARTICLE 5: SYNCHRONISATION, COMMISSIONING AND COMMERCIAL OPERATION

5.1 Synchronisation, Commissioning and Commercial Operation

5.1.1 The WPD shall give the concerned RLDC/SLDC and Buyer at least sixty (60) days advanced preliminary written notice and at least thirty (30) days advanced final written notice, of the date on which it intends to synchronize the Power Project to the Grid System.

5.1.2 Subject to Article 5.1.1, the Power Project may be synchronized by the WPD to the Grid System when it meets all the connection conditions prescribed in applicable Grid Code then in effect and otherwise meets all other Indian legal requirements for synchronization to the Grid System.

5.1.3 The synchronization equipment and all necessary arrangements / equipment including RT, for scheduling of power generated from the Project and transmission of data to the concerned authority as per applicable regulation shall be installed by the WPD at its generation facility of the Power Project at its own cost. **The WPD shall synchronize its system with the Grid System only after the approval of synchronization scheme is granted by the head of the concerned substation/Grid System and checking/verification is made by the concerned authorities of the Grid System.**

20. From the above, the Commission observes that the ‘Commissioning Procedure’ for the Project was to be intimated by SECI in due course of time. The Project will be considered as commissioned if, (i) All equipment as per rated capacity has been installed and energy has flown into grid, in line with the commissioning procedures; (ii) Project has been physically inspected by duly constituted committee; (iii) the Project has been certified as successful commissioned by the said committee; (iv) Commercial Operation Date will be the actual date of commercial operation/commissioning of the project as declared by the Committee.
21. It is observed that in compliance to Clause 3.17 of the RfS, the Commissioning Procedures were circulated by SECI to the Petitioner vide email dated 04.05.2018, which mandates as under:

B. Commissioning Procedure

1. ***Wind Power Developer (WPD) shall give to PTC (if applicable), PGCIL, State Nodal Agency (SNA), RLDC and SECI at least thirty (30) days' final written notice, of the date on which it intends to synchronize the Project to the Grid System. The WPD shall be solely responsible for any delay or non-receipt of the notice by the concerned agencies, which may in turn affect the commissioning schedule of the Project.***
2. ***Wind Power Developer shall ensure that the Wind Turbine Generators (WTGs) have been installed and completed in all aspects and the Project is synchronized to the grid in order for it to be declared as being commissioned. The Project may be synchronized with the grid on WTG-basis.***
3. ***The Project would be considered for Commissioning only upon synchronization of at least 50 MW or 50% of the Project capacity, whichever is higher, and balance capacity thereof in batches of capacity not less than 50 MW or in one go. It may be noted that energy accounting for the Project shall commence only from the date of commissioning as declared by the State Nodal Agency.***
4. ***Early Commissioning of a Project prior to the SCD is permitted on acceptance of power by PTC (in case of Tranche-I projects) / SECI (in case of Tranche-II projects). In order to facilitate this, WPDs shall inform the concerned agencies and PTC/SECI well in advance regarding the date it intends to synchronize the Power Project to the Grid System.***
5. ***Prior to being declared as being commissioned, the Project shall be inspected by the CEIG/CEI (as applicable) and all the approval for all the components, including the wind turbines, along with all annexures/attachments, such as approval of the CEA under Section 68 and Section 164 of the Electricity Act, shall be obtained by the WPD prior to be declared as fit for synchronization of the Project.***
6. ***Subsequently, a Commissioning Committee constituted under the chairmanship of the State Nodal Agency and comprising officials from CTU and the WPD as other members, shall visit the Project site to witness commissioning of the Project. The WPD shall obtain the Synchronization certificate from the Transmission licensee/RLDC/SLDC/any other competent authority as applicable, as per***