

17. Petitioner submits that Guidelines provide for termination of capacity which is delayed beyond six months from SCOD. However, Petitioner proposes to consider continuing with such capacity which is delayed but likely to get materialized beyond six months from SCOD owing to following:
- a. Carrying out long term competitive bidding is a long drawn and time-consuming process. Acceptance of COD beyond 6 months has been kept open to ensure that option of sourcing of power is not lost merely for delay due to genuine reasons.
 - b. It will provide flexibility to the Discom to avail power if there is visibility on project commissioning.
 - c. Further, in such cases, Successful Bidder is required to bear the transmission open access charges till actual COD, if any. Hence, interest of the Distribution Licensee as well as that of end consumers is protected in the event COD of the project is delayed owing to non-force majeure events.
 - d. In view of above, Petitioner requests the Hon'ble Commission to accept the proposal of the Petitioner to consider continuing with capacity which is delayed but likely to get materialized beyond six months from SCOD.

F. Compensation for Shortfall:

18. Petitioner submits that the Guidelines provides for compensation for shortfall at the rate of 400% of applicable tariff. In this regard, the Petitioner has submitted as under: -
- a. The rate of penalty has direct bearing on the quoted tariff since, bidder would invariably factor higher premium for higher penalty for shortfall. In order to encourage more participation and to ensure discovery of attractive tariff in the interest of end consumers, Petitioner proposes to relax the provision by keeping it equal to 100% of the applicable tariff. It may be noted that in case of long-term tenders, these rate ranges between 20-30% of quoted tariff. However, the Petitioner proposes to keep it equal to applicable tariff rate so as to fulfil the requirement from alternate source, if any.
 - b. Clause 19 of the MOP Bidding Guidelines provides that in case it becomes imperative for the Procurer to deviate from the Guidelines and/or the SBDs,

the same shall be subject to approval by the Appropriate Commission, before the initiation of bidding process itself. Further, the Appropriate Commission shall approve or require modification to the bid documents within a reasonable time not exceeding 60 (sixty) days of filing such petition.

19. The Petitioner has clarified that pursuant to approval of this Commission, Petitioner shall issue the tender and carry out the bidding process. Thereafter, the Petitioner shall approach the Commission for adoption of tariff under Section 63 of the Act read with Clause 11.4 of the MOP Bidding Guidelines.

ANALYSIS OF THE COMMISSION

20. As per Clause 19 of Guidelines if it becomes **imperative** for the Procurer to deviate from these Guidelines and/or the SBDs, the same shall be subject to approval by the Appropriate Commission, before the initiation of bidding process itself. The Appropriate Commission shall approve or require modification to the bid documents within a reasonable time not exceeding 60 (sixty) days of filing such petition. The relevant extract of Clause 19 is as under: -

“...19. DEVIATION FROM PROCESS DEFINED IN THE GUIDELINES

*The objective of these Guidelines is to bring standardization & uniformity in processes so that there is fairness & transparency in procurement. As such, these Guidelines need to be strictly followed in the bidding process and no bid, under section 63 of the Electricity Act, for procurement of Round-The-Clock (RTC) power from grid-connected Renewable Energy (RE) power projects, complemented/balanced with power from coal based thermal power projects, shall be issued in contravention to these Guidelines. However, **in case it becomes imperative for the Procurer to deviate from these Guidelines and/or the SBDs, the same shall be subject to approval by the Appropriate Commission, before the initiation of bidding process itself.** The Appropriate Commission shall approve or require modification to the bid documents within a reasonable time not exceeding 60 (sixty) days of filing such petition.....”*

21. The changes proposed in terms of the table at para 9 of the Petition are dealt with as under: -

I. Bundling - Proposed under modified Clause 1.2.1 of the RFS

22. Petitioner has proposed to specify and restrict the category of Renewable Energy based projects under the RFS to only "Solar and/or Wind" and no bundling with other sources.

23. As per Clause 2.2 of Guidelines as amended on 05.02.2021, the definition of RE Power is noteworthy: -

"Renewable (RE) Power": The term "RE Power", or 'Renewable Power', or 'Renewable Energy Power', wherever used in these Guidelines, shall refer to power from Solar Power Generating Systems, Wind Power Generating Systems, or a combination thereof, with or without Energy Storage System (ESS)..."

24. Further, Clauses 1.1.1, 1.1.2, 1.1.3, and 1.2.1(a) and (b) specify object of guidelines to advance Solar/Wind (RE) power and capacity addition and fulfilment of RPO.

25. When the said Guidelines were introduced, they did not envisage Energy Storage System ("ESS"). Therefore, intermittency had to be managed by 'bundling' to provide RTC power. However, with introduction of the Guidelines for ESS dated 11.03.2022 ("**ESS Guidelines**"), now intermittency can be managed with ESS and bundling may not be required.

26. We note that "any other source" in the ESS Guidelines is defined to mean any source other than "RE power" or "ESS". However, the proposed deviation by the Petitioner does not seem to violate the said definition.

27. Further, Ministry of Power circular dated 22.07.2022 MOP F No. 09/13/2021-RCM re RPO and Energy Storage Obligation also promotes RE with ESS.

28. In view of the aforesaid, the proposed deviation being imperative in the interest of fulfilling RPO obligation of the Petitioner and legally tenable in terms of the Electricity Act, 2003 and the ESS Guidelines, the said deviations allowed.

II. Defining and Declaring Peak Hours

29. Petitioner has proposed to define peak hours instead of adopting the peak hours specified in the Guidelines. In this regard, Petitioner seeks the following modifications: -

Re. Peak Hour

- a. **Cl.2.1(RFS)/1.1(PPA)** - *Insert definition of Peak Hour "Peak Hours" shall mean any six hours duration, not necessarily continuous, out of 24 hours day period as declared by DNHDPDCL on day-ahead basis. For the purpose of scheduling, a 'day' shall commence from 00:00 hrs and end at 24:00 hrs.*
 - b. **Cl.3.9.4(a)(RFS)/3.2.1(PPA)** - *Successful Bidder(s) shall maintain generation so as to achieve annual CUF of 90% of the Contracted Capacity in AC terms till the end of the PPA duration of 25 years. The annual CUF will be calculated every year from 1st April of the year to 31st March next year.*
 - c. **Cl.3.9.4(b)(RFS)/3.2.2(PPA)** - *Successful Bidder shall supply energy corresponding to a minimum 90% CUF of the Contracted Capacity in AC terms during each Peak Hour. The requirement of electricity supplied during Peak Hours is to be mandatorily met for each Peak Hour on a day-to-day basis and shall be monitored on a monthly basis.*
 - d. **Cl.3.9.4(c)(RFS)/3.2.3(PPA)** - *However, one Year stabilisation period will be provided to Successful Bidder from SCOD. During this stabilisation period, Successful Bidder should be required to meet minimum 80% Annual CUF as well as 85% CUF during peak hours. It is clarified that in case of delay in actual commissioning of Project/Unit/ capacity, then also stabilisation period will end 12 months from the SCOD. After the end of the stabilisation period, Successful Bidder shall supply energy corresponding to minimum 90% CUF on annual as well as for each Peak Hour.*
30. Petitioner submits that the objective of defining Peak Hours is to ensure availability of tied up capacity during Peak Hours and make payment of Capacity Charge accordingly. It has also been submitted that the restriction under Regulation 2(2) of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 ("**CERC Tariff**

Regulations") are not applicable to the present bidding as the Petitioner has proposed to carry out competitive bidding under Section 63 of the Act, to procure wind and/or solar power with/without storage on round-the-clock basis.

31. We note that the Petitioner is not bound by the CERC Tariff Regulations, 2017. However, in our view, the aforesaid deviation cannot be allowed for the following reasons: -
- a. As per Clause 7.2(a) of the Guidelines, **"7.2 Power Procurement (a). The procurement shall be in power (MW) terms. The Generator has to ensure at least 85% availability, both annually and also during the peak hours. Peak hours will be four hours out of 24 hours during either morning and/or evening to be clearly specified beforehand in the Bidding Documents by the Procurer."**
 - b. As per amendment dated 03.11.2020, Clause 7.2(a) was amended and **"Peak hours will be four hours...declared by RLDCs as per relevant CERC regulation"**
 - c. The intention of the Petitioner is now to change power of declaring peak hours, by taking it away from RLDC and granting it to the procurer. Such a change is not in line with the specific provisions of the Regulations.
 - d. Further currently the said four hours are prescribed and declared by RLDC. This is prescribed in the Guidelines as it falls under the function of RLDC under Section 28 of the Act. It cannot be therefore transferred to the Discom.
32. In any case, the term used originally in Clause 7.2 of the Guidelines is **"clearly specified in bidding document"** cannot be decided on day-to-day basis as a day ahead system as proposed. As such the proposed deviation is not allowed.

Re. 90% CUF

33. While proposing to define any six hours as Peak Hours, Petitioner has proposed to link the same with availability of RE Power above 90% of Capacity Utilization Factor (CUF) during each of the Peak Hours.
34. We note that as on date only 51% of RE contribution annually has been mandated as per Guidelines. The proposed deviation only increases the said mandate and

therefore is in line with procurement requirement 90% availability 7.2(a) of Guidelines.

35. As regards the proposal under proposed **Clause 3.9.4(b) of the RFS** that the requirement of electricity supplied during Peak Hours corresponding to a minimum 90% CUF is to be mandatorily met for each Peak Hour on a day-to-day basis and shall be monitored on a monthly basis, it is observed that as per para 34 above, a deviation of 90% CUF [Clause 7.2(a)] as against a provision of 85% availability has been allowed based on that fact that in the present case, some of the power is 100% RE. RE source is at 100%.
36. Further, as regards adding one year stabilization period from SCOD with 80% CUF annually and 85% CUF during peak hours under proposed **Clause 3.9.4(c)** of the RFS, this is a fresh modification and is not in accordance with the Guidelines. The said deviation is therefore disallowed.

III. Penalty for Delay in Commissioning – Proposed Deviation under Clause 3.11.3 of the RFS (Original Clause 15.4)

37. Petitioner has proposed to allow option of not automatically terminating PPA for un-commissioned capacity after SCOD + 6 months. The proposed deviation is as under: -

“Cl.3.11.3(RFS)/3.17.1(PPA)

Penalty for Delay in Commissioning:

Delay in commissioning and commencement of supply of power, beyond the Scheduled Commissioning Period shall involve penalties on the Generator, as detailed below:

For Delay in commissioning upto 6 (six) months from SCOD, encashment of Performance Bank Guarantee (PBG), or alternate instruments, on per day basis and proportionate to the capacity not commissioned. For example, in case of a Project of 150 MW capacity, if commissioning of 50 MW capacity is delayed by 18 days beyond the SCOD, then the liquidated damages shall be: PBG amount X (50/150) X (18/180). For the purpose of calculations of the liquidated damages, 'month' shall be considered consisting of 30 days.

For Delay in commissioning beyond six months from SCOD, Generator Event of Default, shall be considered to have occurred. DNHDDPDCL will have sole discretion of reducing the project capacity commissioned upto SCOD + 6 (six)

months and terminate the PPA for the balance capacity. However, DNHDDPDCL may allow the further extension subjected to mutual discussion & bidder's concurrence to comply with the appropriate commercial mechanism as may be required by DNHDDPDCL.

In addition, if the Commissioning of the Project or part thereof is delayed beyond the start date of grant of transmission open access, then transmission charges should be borne by Successful Bidder till COD of the Contracted Capacity. In case SCOD of the project is extended due to force majeure events, successful bidder shall not be liable to bear any transmission charges till extended SCOD.

In the event of termination of PPA or part thereof, any damages or charges payable to the STU/CTU, for the Open Access of the Project, shall be borne by the Successful Bidder(s).

38. The proposed change as submitted will help in: -

- a. *Carrying out long term competitive bidding is a long drawn and time-consuming process. Acceptance of COD beyond 6 months has been kept open to ensure that option of sourcing of power is not lost merely for delay due to genuine reasons.*
- b. *It will provide flexibility to the Discom to avail power if there is visibility on project commissioning.*
- c. *Further, in such cases, Successful Bidder is required to bear the transmission open access charges till actual COD, if any. Hence, interest of the Distribution Licensee as well as that of end consumers is protected in the event COD of the project is delayed owing to non-force majeure events.*

39. We feel that the aforesaid is beneficial and is in the interest of the present scenario. Currently there is nothing in the Guidelines and the provisions of the Act to suggest any bar on such condition, given special circumstances. Therefore, the proposed deviation is allowed subject to the approval of the commission before extension of period of commissioning beyond 6 months of SCOD.

IV. Penalty for shortfall in generation– Proposed Deviation under Clause 3.9.5 of the RFS [Original Clause 7.2(e)]

40. Petitioner has proposed to reduce penalty from 400% to 100% of tariff for shortfall in RE energy generated, below 90% CUF annually. The proposed clause is as under:

Cl.3.9.5(RFS)/3.3.1(PPA)

If for any Contract Year, it is found that the Successful Bidder has not been able to generate minimum energy corresponding to 90% of annual CUF, such shortfall in performance shall make the Successful Bidder liable to pay the compensation corresponding to the energy shortfall, calculated at 100% of the Tariff mentioned in the Article 5 of the PPA. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. Billing frequency for shortfall in annual CUF will be on yearly basis.

41. We note that penalty is a measure to maintain discipline, and such a strict measure is necessary. Therefore the proposed relaxation cannot be considered. Hence the proposed amendment/deviation is disallowed.

V. Part Commissioning - Proposed Deviation under Clause 3.11.1 (RFS) / 4.1.7 (PPA) (Original Clause 15.1)

42. Petitioner has proposed to reduce the Minimum Capacity for accepting Part Commissioning to 25 MW from 100MW. The proposed deviation is as under: -

"Part Commissioning: Part commissioning of the Project shall be accepted by Procurer subject to the condition that the Minimum Capacity for acceptance of first and subsequent part(s) commissioning shall be 25 MW, without prejudice to the imposition of penalty, in terms of the PPA on the part which is not commissioned. However, the SCOD will not get altered due to part-commissioning, irrespective of dates of part commissioning or full commissioning, the PPA will remain in force for a period of 25 (twenty-five) years from the SCOD or the date of commissioning of full project capacity, whichever is later."

43. In support of the same, Petitioner submits that the Standard Bidding Guidelines provide for 100 MW for part commissioning, irrespective of the tender size. In the instant tender, bidder is allowed to offer minimum 75 MW and hence, applicability of 100 MW is not possible. Further, Petitioner is facing significant RPO shortfall and allowing part commissioning of 25 MW will only help it in fulfilling RPO as soon as the part capacity gets commissioned.

44. It is noteworthy that as per Clause 6.2 of Guidelines (as amended on 03.11.2020) such a deviation in quantum can be offered. The relevant clause is as under: -

"Smaller minimum quantum can be offered in case of North-Eastern State, Special Category States and Projects outside RE parks".

45. It views thereof, noting the requirement of Petitioner and the necessity for RPO Compliance, Part Commissioning as proposed is being allowed.

VI. Single Levelized Tariff - Proposed Deviation under Clause 1.1.3 (RFS)

46. Petitioner has proposed deviation from average levelized tariff. The proposed change is as under: -

"Project selected under this RFS shall be eligible for Tariff quoted by the Successful Bidder(s) for the energy supplied during Peak Hours and Off-Peak Hours. The bidders shall quote single levelized tariff. The Tariff under the PPA shall be fixed for the entire term of the PPA."

47. Petitioner has submitted that since it has proposed to consider only RE sources, quoted tariff would be single levelized tariff. Hence, the proposed deviation is allowed.

VII. Extension in case of delay beyond control of the Bidder - Proposed under Clause 3.18 (PPA) [No corresponding clause in the Guidelines]

48. Petitioner has proposed for insertion of a new clause (in RfS) as under:-

Clause 3.18 (PPA)

Subsequent to grant of connectivity, in case there is a delay in grant/operationalisation of LTA by the CTU and/or there is a delay in readiness of the ISTS substation at the Delivery Point, including readiness of the power evacuation and transmission infrastructure of the ISTS network until SCOD of the Project, and it is established that:

The Successful Bidder has complied with the complete application formalities as per the connectivity procedure.

The delay in operationalisation of LTA and/or delay in readiness of the ISTS substation at the Delivery Point, including readiness of the power evacuation and transmission infrastructure of the ISTS network, is a factor solely attributable to the CTU/transmission licensee and is beyond the control of the Successful Bidder.

The above shall be treated as delay beyond the control of Successful Bidder and such Project shall be eligible for suitable time extension in their SCOD.

In case SCOD of the project is extended due to force majeure events, successful bidder shall not be liable to bear any transmission charges till extended SCOD.

49. Petitioner has submitted that this is a clarificatory clause purely with the purpose of avoiding any future litigations. It has also been submitted that the Ministry of Power has recently issued similar amendment in the Guidelines for Grid Connected Wind Solar Hybrid Projects.
50. We take note of the fact that this may be a mere clarificatory clause in view of existing judgments on the said issue. However, we cannot take a view on this aspect in the present proceedings.
51. Petitioner itself has admitted that there exists no such corresponding clause in the Guidelines. In view of this being a new suggestion and not a deviation, we cannot approve such a change. In our view, approval of incorporation of a completely new clause in the Guidelines is beyond the domain of the power of this Commission under Clause 19.

VIII. Green Shoe Option

52. The proposal of Green Shoe option that Petitioner is proposing to procure 150 MW with additional 150 MW under Green shoe option through competitive bidding process is to comply with the Renewable Purchase Obligation (“RPO”) trajectory specified by the Commission and the prevailing shortfall in fulfilment of RPO.
53. The petitioner further submitted that Green shoe option is a method in which an additional capacity of power may be procured via the process of competitive bidding to meet RPO.
54. The methodology for allotment of green shoe option is detailed at Para 3.2.1.2 of the Request for Selection (RfS)

“.....3.2.1.2 Capacity Allocation Under Green Shoe Option:

Upton 150 MW additional capacity through green shoe option may be offered to the Successful Bidder(s), who are willing to execute PPA(s) with DNHDDPDCL at the lowest tariff (L1 rate) discovered under Competitive Bidding Process (followed by e- reverse auction) to the extent of their respective quoted capacity or higher quantum (in case any of the Successful Bidder does not accept the additional quantum offered under green shoe option) to the extent of green shoe capacity.

The bidders willing to execute PPA with DNHDDPDCL at the L1 rate shall have to give their confirmation within a period of 10 days from the conclusion of reverse auction.

Green shoe capacity shall be allocated in proportion of capacity allotted to the Successful Bidders in the reverse auction and willing to offer additional capacity under Green shoe option. In case Successful Bidder(s) is not willing to offer additional quantum under Green shoe option then other Bidders who are willing to match L1 rate shall be allocated Green shoe capacity in the order of their ranking discovered in the e-reverse auction.

The terms and conditions as well as obligations & rights of the Successful Bidder(s) as well as DNHDDPDCL shall be identical for the additional capacity allocated under Green shoe option as for the base capacity of 150 MW under this RfS.....”

55. The rationale behind the green shoe option submitted by the Petitioner is that it will provide flexibility to the Petitioner to tie up the additional capacity for procurement of solar/wind power. If it is found that the rate discovered under e-reverse auction are beneficial to the Petitioner to purchase the power at cheaper rate of discovered lowest tariff i.e., L1, assuming that 3 bidders are selected in the bucket filling process i.e., L1, L2, L3, the additional 150 MW under green shoe will be awarded only at L1 rate thereby benefitting the Petitioner and in turn its consumers in terms of power purchase rate.
56. The aforesaid submissions in favor of the green shoe option are considered to provide bandwidth to the Petitioner to comply with the Renewable Power Obligation (RPO) which is in high pendency. We note that awarding additional capacity under Green shoe option is a prevalent industry practice with Hon'ble CERC, MERC, GERC and several other Regulatory Commissions having adopted the same.

57. Section 63 of the Act does not prescribe a specific type of bid structure to be adopted by the Central Government. It has been left open to the Central Government to decide the provisions of the Guidelines and bid structure for procurement of power. Accordingly, the said incorporation of Green Shoe Option is in compliance with the directives of the Government and the said Guidelines. It is noteworthy that MNRE, Government of India by its letter dated 14.8.2019 directed SECI to incorporate 'Green Shoe Option' in its bid. The relevant extract of the said letter dated 14.8.2019 is as under:-

"In reference to the subject RfS, the undersigned is directed to convey to SECI, that in line with discussions with industry stakeholders and further examination in MNRE, the following decision have been taken by MNRE:

..... viii SECI to provide a "Green-Shoe Option" to successful bidder(s) equivalent to the capacity(ies) won by such successful bidder(s).

The above decisions are in line with the approval from Hon'ble Minister (Power & MNRE)"

58. The said provision was reiterated in the letter dated 09.10.2019 issued by MNRE, Government of India as under:

"2. The following has been decided with regard to SECI's Manufacturing-Linked-PPA Tender:

(d) The earlier instructions to SECI, vide letter no. 336/39/2017-NSM (Part File) dated 14.08.2019, my accordingly be read as under :

.....

vi SECI to provide a "Green-Shoe Option" to successful bidder(s) equivalent to the capacity(ies) won by such successful bidder(s).

3. These issues with the approval from Hon'ble Minister (Power & MNRE)"

59. We observe that Green-Shoe options are being incorporated in bids increasingly. This is on account of directions of the MOP and MNRE. It is a settled position that the communications issued by Ministry of Power are effectively a modification of Guidelines. We take note of the judgment of Hon'ble Appellate Tribunal dated 22.03.2022 in Appeal No. 118 of 2021 and Appeal No. 40 of 2022 has held that the

publication of notification facilitates only dissemination of knowledge of law and that the publication in gazette cannot be a pre-requisite for an instrument to have a force of law. The relevant extract of the said judgment dated 22.3.2022 is extracted below: -

“10. As observed earlier, the publication of notification or circular in gazette cannot be invariably a pre-requisite for an instrument to have a force of law. The trappings of law do not come by virtue of publication which facilitates only dissemination of knowledge of law, statutes, etc. [Harla vs The State of Rajasthan (AIR 1951 SC 467)].”

60. Green-shoe option appears reasonable subject to the condition that the Petitioner will have to approach the Commission for adoption of tariff in respect of the additional capacity once such capacity is tied up. PPA(s) for such capacity will separately be required to be executed and considered by the Commission in accordance with the law.
61. This additional capacity so transferred will be offered to the bidders of the Package to which this additional capacity has been transferred in the order of preference of L1, L2, L3 and so on, till the total additional capacity is exhausted.
62. In view thereof, Green-shoe option is allowed subject to the aforesaid conditions.

IX. Waiver of inter-state transmission charges:

63. Petitioner has also proposed waiver of ISTS Charges. Petitioner has submitted that:

“It may be noted that at present, RE projects commissioned upto Jun 2025 are exempted from payment of Interstate Transmission Charges. Hon’ble CERC, vide its notification dated 7th February 2023, has notified the same vide its amendment CERC (Sharing of Inter-State Transmission Charges and Losses) (First Amendment) Regulations, 2023; wherein Regulation 13(2) provides for waiver of transmission charges for the use of ISTS in specific cases. The Regulation 13(2)(a) provides as under:

“(a) REGS or RHGS based on wind or solar sources or Hydro PSP ESS which have declared commercial operation upto 30.6.2025 shall be considered for waiver of transmission charges. for a period of 25 years from date of COD.”


In this background, considering the gestation period of wind and/or solar plant of around 24 months and time to conclude bidding process (minimum 4 months), the Petitioner submits that it is required to initiate the bidding process for procurement of Round-The-Clock Power from Grid Connected wind and/or solar projects with/without storage, latest by February, 2023, in order to sign the PPA by May, 2023 to ensure commissioning of the project before 30th June, 2025. If signing of PPA and in turn, commissioning of project gets delayed, the landed cost of the power would directly increase to that extent, which would be against consumer interest.

64. Waiver of inter-state transmission charges is outside the jurisdiction of this Commission. It is under the jurisdiction of the CERC and hence this Commission cannot allow such proposal of the Petitioner.
65. Ordered accordingly.

Sd/-

Ms. Jyoti Prasad
(Member, Law)

Certified Copy



(S.D. Sharma)

Secretary, I/c, JERC

