

clarified. The Petitioner vide communication dated 21.11.2018 clarified its position to GUVNL that its WTG was commissioned on 31.03.2017, which has been certified by Respondent GEDA vide its Certificate of Commissioning dated 15.04.2017. The Petitioner further explained that post successful commissioning, there were certain technical issues in the turbine and the same could not be resolved on time due to severe RoW issues. The issues were further aggravated as the roads leading to the turbine were also washed away in the monsoon and could not be re-built immediately due to RoW issues.

4.11 Since the genuineness of the proof of commissioning was in question, Respondent GEDA also clarified its stand to GUVNL vide letter dated 02.01.2019 and further emphasized upon GUVNL that the WTG of the Petitioner was commissioned on 31.03.2017 at the site and the commissioning certificate was issued to the Petitioner on 15.04.2017.

4.12 On 12.04.2019, since no payment was forthcoming from GUVNL on the energy invoices raised, vide another correspondence GUVNL was implored to release payments as the delayed payment was adversely impacting the Petitioner's ability to service its debt and make O&M and statutory payments and causing undue hardship to the Petitioner. On 24.04.2019, GUVNL, instead of releasing payments to the Petitioner, called upon the Petitioner to substantiate the fact that its WTG was successfully commissioned on 31.03.2017 as the Wind Energy Certificates issued by State Load Despatch Centre (referred as "SLDC") during the months from March, 2017 to August, 2017 have recorded "zero generation". It is further stated in the letter that till the date an acceptable reply is received from GEDA on the issue of "zero" generation, GUVNL will not be in a position to process any of the invoices. The Default Notice has been issued on the basis of Wind Energy Certificates issued by the SLDC, which cannot be used as a basis to establish commissioning of a project. The Wind Energy Certificates are issued by SLDC for the limited purpose of energy settlement between DISCOMs, wind farm owners supplying energy and consumers receiving such energy.

4.13 Vide letter dated 09.05.2019, GUVNL was informed that GEDA has already responded to GUVNL vide its letter dated 02.01.2019 and thus, the payments due and payable to

the Petitioner may be released as non-payment of the same was causing tremendous financial constraints to the Petitioner. Vide letter dated 15.05.2019, GUVNL informed the Petitioner that it has not received GEDA's letter dated 02.01.2019. In response thereto, the Petitioner on 13.06.2019, attached GEDA's response with its letter and once again implored the GUVNL to make payments against the energy invoices already raised.

- 4.14 GUVNL, on 11.07.2019, issued a Default Notice to the Petitioner under Clause 9.3.1 of the PPA, on the purported ground that the Petitioner has failed to perform material obligations under the PPA by not fulfilling the basic condition under the PPA that the project should be commissioned on or before 31.03.2017. The Default Notice has admittedly been issued on the basis of the Wind Energy Certificates issued by the SLDC, which purportedly shows "zero generation" for the Petitioner's WTG during the months of March, 2017 to August, 2017. Respondent No. 1/GUVNL further called upon the Petitioner to remedy the alleged default within a period of 30 days from the date of receipt of the Default Notice, failing which Respondent no. 1/GUVNL threatened to issue a Termination Notice and terminate the PPA.
- 4.15 The Default Notice was responded wherein once again it was reiterated that WTG was duly and successfully commissioned on 31.03.2017, in complete adherence to the provisions of the PPA. There has been no default and breach of the material obligations under the PPA. The SLDC certificates cannot serve as a tool to ascertain commissioning of a plant, as Wind Energy Certificates are issued by SLDC every month for the limited purpose of energy accounting and settlement between distribution licenses, wind farm owners and consumers. The factum that the Petitioner is registered with IREDA and is entitled to and is receiving the GBI benefit under the MNRE's GBI Scheme further corroborates the fact that the WTG of the Petitioner was commissioned on or before 31.03.2017, as the same was a requisite to qualify for the GBI benefit under the scheme. Hence, GUVNL was requested to withdraw the Default Notice issued by it forthwith. Respondent GUVNL did not respond to the Petitioner's request for withdrawal of the Default Notice. The Petitioner had valid and reasonable apprehension that Respondent GUVNL may proceed to terminate the PPA pursuant

to issuing the Default Notice issued in a completely arbitrary and malicious manner. Accordingly, on 06.08.2019, the Petitioner filed this Petition.

- 4.16 Despite being aware of the pending Petition and Interim Application, the Respondent GUVNL issued notice to the Petitioner under Article 9.3.1 of the PPA seeking termination of the PPA dated 31.03.2017 for the alleged breach on the part of the Petitioner and discharge itself from all obligations under the PPA w.e.f. 31.03.2017. The Termination Notice further provided that the PPA dated 31.03.2017 was void and not enforceable since the Petitioner was unable to achieve commissioning by 31.03.2017. The Respondent GUVNL via the Termination Notice, also sought a payment of Rs. 1.78 crores from the Petitioner towards compensation to Respondent No. 1/GUVNL, as per the option exercised by the Respondent GUVNL being towards the compensation equivalent to three years billing on normative PLF (i.e., 24.5%). The Termination Notice was received by the Petitioner vide email dated 16.08.2019 at 7.24 pm.
- 4.17 The Respondent GUVNL has *mala fidely* proceeded to issue the Termination Notice, despite being aware that a Petition and an Interim Application have been moved before this Commission on 06.08.2019 and have been listed for hearing on 20.08.2019. The said conduct of the Respondent GUVNL reeks of *mala fides*, highhandedness and colourable exercise of the power.
- 4.18 All material obligations under the PPA have been meticulously complied with and Petitioner has throughout acted in complete compliance and adherence to the provisions of the PPA at all times. Hence, any unilateral termination of PPA by GUVNL in furtherance of the unlawfully issued Default Notice would grievously and irreparably prejudice the rights and interests of the Petitioner.
- 4.19 There is no reason for GUVNL to doubt the commissioning of the Petitioner's WTG as under the Article 4.1 (i) read with Schedule 3(3) of the PPA, the wind producers are required to get a certificate of commissioning from GEDA. The GEDA, after observance of all the testing procedures and requirements under law issued the Certificate of Commissioning to the Petitioner's WTG. A bare perusal of the same shows that the

WTG of the Petitioner was operated from 16:35 hours to 16:45 hours and energy of 5 kWh units was generated from the Petitioner's WTG. The same is sufficient to show that the Petitioner's plant was successfully commissioned on 31.03.2017. Further, if GUVNL is permitted to doubt on the genuineness of the certificate of commissioning issued by GEDA, the same would lead to abuse and arbitrary use of its power and would create a cloud of doubt over all the certificates of commissioning ever issued by GEDA.

4.20 Under Article 1 of the PPA, "Commercial Operation Date" is defined as: "Commercial Operation Date with respect to the Project/WTG shall mean the date on which the Wind Turbine Generator is available for commercial operation (certified by GEDA) and such date as specified in a written notice given at least ten days in advance by the Power Producer to GUVNL". Further, Scheduled Commercial Operation Date is defined and stated to be 31.03.2017. A conjoined reading of the two definitions makes it amply clear that a wind turbine generator has to be available for commissioning on or before 31.03.2017, and the availability of the WTG for commercial operation has to be certified by GEDA. A bare reading of the above provisions also shows that a wind turbine generator is required to be available for commercial operation on or before 31.03.2017. Further, the availability of commercial operation has to be certified by GEDA. The Certificate of Commissioning dated 15.04.2017 serves both these requirements of PPA in as much as it certifies that the Petitioner's WTG was successfully commissioned on 31.03.2017 and hence, available for commercial operation.

4.21 As per the requirement of the PPA, the Petitioner has always dutifully acted within the four corners of the PPA provisions and by no stretch of imagination it can be said to be in breach of its material obligation under the PPA. The Petitioner is availing the benefit of the GBI Scheme of the Central Government. One of the pre-requisites for availing the said benefit was for the power plants to be commissioned on or before 31.03.2017. Thus, the fact that the Petitioner was considered eligible and is availing the benefit of the GBI Scheme substantiates the stand of the Petitioner that its WTG was commissioned on 31.03.2017.

4.22 GUVNL itself in the Petition No. 1676 of 2017 filed before this Commission for seeking approval of the PPA has acknowledged that the Petitioner's WTG was commissioned as on 31.03.2017. The order dated 01.10.2018 in the said Petition has made observations to the same effect. The relevant extracts are reproduced hereinunder:

*"2. Facts narrated in the petition are as under:*

...

2.11. *It is relevant to mention that the Wind Power Projects, which were not availing the benefit of Accelerated Depreciation, were eligible for an additional benefit under the MNRE's Generation Based Incentive (GBI) Scheme which was valid for projects commissioned only upto 31.03.2017. To take advantage of the additional GBI benefit by execution of PPA by 31.3.2017, various wind power project developers who were ready to commission their projects by 31.3.2017, represented at various levels in the Government for signing PPAs with GUVNL before 31.3.2017 at mutually agreed tariff of Rs. 3.46 per unit after taking into consideration the cost-effectiveness of tariff of Rs. 3.46 per unit discovered in the competitive bidding process conducted by SECI so as to save their investment from getting stranded.*

...

2.13 *Due to paucity of time, GUVNL through letter dated 27.3.2017 once again took up the matter to GoG. In this regard, Government of Gujarat through letter dated 28.3.2017 accorded approval to the proposal of GUVNL as under:*

*I. GUVNL shall sign PPAs at the rate of Rs. 3.46/unit which is the rate discovered in the competitive bidding process conducted by SECI by specifically mentioning in all such PPAs that the same is subject to approval of the Commission.*

*II. GUVNL shall sign PPAs only with the projects which are ready for commissioning on or before 31.3.2017.*

*III. GUVNL shall sign PPAs as per RPO requirement of GUVNL for FY 2016-17 and 2017-18.*

...

2.15 *Accordingly, GUVNL executed PPAs with the Respondents at the tariff of Rs. 3.46/unit aggregating to 86.55 MW as tabulated below subject to approval of the Commission:*

...

2.18 *These projects are already commissioned and the benefit of the electricity is going to the consumers at large. Thus, the PPAs are in public interest and would go on to satisfy the Renewable Purchase Obligations of GUVNL/DISCOMs.*

...

11.11 *The Wind Power Projects not availing the benefit of Accelerated Depreciation were eligible for an additional benefit under the MNRE's Generation Based Incentive Scheme which was valid for projects commissioned only up to 31.3.2017. To take advantage of the additional GBI benefit by execution of the PPA by 31.3.2017, various wind power project developers who had already invested money and who were ready to commission their projects by 31.3.2017, approached the Petitioner/Govt. of Gujarat for signing PPAs before 31.3.2017 at a mutually agreed tariff of Rs. 3.46/kWh.*

...

17.5 *It is observed that Government of Gujarat vide letter No. PRC/11/2017/483/B dated 21.03.2017 advised the Petitioner GUVNL to approach and seek direction of the Commission regarding the tariff at which GUVNL may execute the Power Purchase Agreements with the projects which are ready for commissioning by 31.3.2017 considering the requirement of RPO for FY 2016-17 and FY 2017-18.*

...

17.8 *As the WTGs of Respondent No. 1 to 13 were ready for commissioning on or before 31.03.2017 and the generation from such WTGs was also available immediately on or before 31.03.2017 and that it would help the Petitioner in meeting the RPO notified by the Commission, they approached the Petitioner stating the above facts and 31.3.2017 being the end date for the Generation Based Incentive (GBI) Scheme of MNRE and Section 80 IA benefits under the Income Tax Act, proposed to sign the PPA at tariff of Rs. 3.46/unit, as discovered in the reverse bidding conducted by SECI/MNRE on 23.2.2017.*

..."

Thus, GUVNL recognized and admitted that the WTG of the Petitioner was commissioned as on 31.03.2017. Now when GUVNL is required to pay under the PPA,