

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 353/AT/2022

Coram:

Shri Jishnu Barua, Chairperson

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of Order: 9th March, 2024

In the matter of

Petition under Section 63 of the Electricity Act, 2003 for adoption of tariff for the Wind Power Projects (Tranche-XI) connected to the Inter-State Transmission System (ISTS) and selected through competitive bidding process as per the guidelines of the Government of India.

And

In the Matter of:

Solar Energy Corporation of India Limited,
6th Floor, Plate-B, NBCC Office Block Tower-2,
East Kidwai Nagar,
New Delhi-110023

..... Petitioner

VERSUS

- 1. ReNew Naveen Urja Private Limited,**
138, Ansal Chamber – II, Bhikaji Cama Place,
New Delhi-110066
- 2. Anupavan Renewables Private Limited,**
508, 5th Floor, Town Centre II,
Andheri-Kurla Road, Mumbai – 400059
- 3. Green Infra Wind Energy Limited,**
5th Floor, Tower C, Building No.8, DLF Cybercity,
Gurugram- 122002, Haryana.
- 4. Azure Power India Private Limited,**
5th Floor, Southern Park, D II,
Sake, New Delhi-110017
- 5. Adani Renewable Energy Holding Fifteen Limited,**
“Adani Corporate House”, 4th Floor South Wing,
Shantigram, Near Vaishno Devi Circle,



SG Highway, Khodiyar, Ahmedabad-382421,
Gujarat

6. Two Wind Energy Private Limited,

[Project Company of Azure Power India Private Limited]
Plot No. 1202, 1215A Door No.8-2-293/82/A/1202,
Sl. Jubilee Road No 61, Jubilee Hill,
Hyderabad- 500033

7. Madhya Pradesh Power Management Company Limited,

Block No. 11, Shakti Bhawan,
Jabalpur– 482008, Madhya Pradesh

8. Chhattisgarh State Power Distribution Company Limited,

Vidyut Seva Bhavan, Dangania,
Raipur (CG) -492013, Chhattisgarh

9. Uttar Pradesh Power Corporation Limited,

Shakti Bhawan, 14 Ashok Marg,
Lucknow-226001, Uttar Pradesh,

...Respondents

Parties present:

Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Anushree Bardhan, Advocate, SECI
Ms. Srishti Khindaria, Advocate, SECI
Shri Vishrov Mukerjee, Advocate, GIWEL
Shri Pratyush Singh, Advocate, GIWEL
Shri Sanjay Sen, Sr. Advocate, RNUPL & AREHFL
Ms. Mannat Waraich, Advocate, RNUPL & ARPL
Shri Mridul Gupta, Advocate, RNUPL & ARPL
Ms. Ruth Elwin, Advocate, AREHFL
Ms. Neha Dabral, Advocate, AREHFL
Shri Hemant Singh, Advocate, AREHFL
Shri Lakshyajit Singh, Advocate, AREHFL
Shri Chetan Garg, Advocate, AREHFL
Ms. Ankita Bafna, Advocate, AREHFL
Ms. Lavanya Panwar, Advocate, AREHFL
Shri Harshit Singh, Advocate, AREHFL
Shri Ravi Sinha, AREHFL
Shri Aniket Prasoon, Advocate, APIPL & TWEPL
Ms. Priya Dhankhar, Advocate, APIPL & TWEPL
Shri Aman Sheikh, Advocate, APIPL & TWEPL
Shri Rishab Bhardwaj, Advocate, APIPL & TWEPL
Shri Vinit Kumar, Advocate, APIPL & TWEPL
Shri Sanjeev Thakur, Advocate, APIPL & TWEPL

ORDER

The Petitioner, Solar Energy Corporation of India Limited ('SECI'), has filed the present Petition under Section 63 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') for the adoption of tariff for wind power projects (Tranche-XI) connected to the inter-State Transmission System (ISTS) and selected through the competitive bidding process as per the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Wind Power Projects" (hereinafter referred to as 'the Guidelines') dated 8.12.2017 issued by the Ministry of Power, Government of India. The Petitioner has made the following prayers:

"a) Adopt the tariff discovered in the tariff based competitive bid process for the aggregate capacity from Wind power projects on the terms and conditions contained in the Power Purchase Agreements signed with the Power Developers read with the Power Sale Agreements signed with the Buying Entities/Distribution Licensees as on the date of reserving the decision in the present Petition after hearing of the parties;

b) Approve the Trading Margin of Rs.0.07/kWh as agreed to by the Buying Entities/ Distribution Licensees in the signed PSAs in terms of Regulation 8 (1) (d) of the Trading License Regulations, 2020.

c) Recognize in terms of Article 12.1.3 of the PPAs and Article 8.1.3 of the PSAs that the change in rates of Safeguard Duty, GST and Basic Customs Duty after 06.07.2021, if any, will be considered as Change in Law subject to the fulfilment of the conditions contained therein and the quantum of compensation payment on account of change in rates of such duties shall be provided to the affected party by the other party as per Article 12.2.3.

d) Pass any other or further order which this Hon'ble Commission may deem fit and proper in the facts and circumstances of this case."

Submissions of the Petitioner

2. The Petitioner has submitted that on 25.5.2021, it issued a Request for Selection (RfS) along with a draft Power Purchase Agreement (PPA) and the draft Power Sale Agreement (PSA) documents for setting up of the 1200 MW ISTS connected wind power projects (Tranche-XI) on a "Build Own Operate" basis as per the Guidelines and floated the same on the ISN Electronic Tender System (ISN ETS)



e-bidding portal. The Petitioner submitted that in pursuance to the above, eleven bids were received offering an aggregate capacity of 2910 MW and all of them were found to meet the technical criteria. On 31.8.2021, the financial bids of technically qualified bidders were opened on the ISN ETS e-bidding portal and out of eleven bidders, ten bidders for capacity aggregating 2610 MW were shortlisted for e-reverse auction. The Petitioner submitted that the e-reverse auction of ten technically qualified bidders was conducted on 2.9.2021 on ISN ETS e-bidding portal and the final tariff was arrived. The Petitioner further submitted that the wind power projects are scheduled to be commissioned in the year 2023-24 and these projects would help the distribution licensees to meet their Renewable Purchase Obligations (RPOs) requirements apart from providing power at very economical rates. Pursuant to the issuance of the Letter of Award to the successful bidders, namely, ReNew Naveen Urja Private Limited (300 MW), Green Infra Wind Energy Limited (180 MW), Anupavan Renewables Pvt Limited (150MW), Adani Renewable Energy Holding Fifteen Limited (450 MW), Azure Power India Pvt. Limited (120MW) on 21.10.2021, the Petitioner has agreed to sell wind power to the distribution licensees, namely, Respondents No. 7 to 9 under the PSA executed with them at the rate of Rs.2.69/kWh [300 MW,180MW, 150MW] and Rs. 2.70/kWh [450MW, 120MW] plus trading margin of Rs.0.07/kWh upon commissioning of the above capacity. In view of the above, the Petitioner has prayed for adoption of tariff as discovered through competitive bidding process carried out by it.

Hearing dated 7.2.2023

3. The matter was heard on 7.2.2023, and notice was issued to the Respondents to file their respective replies. Vide Record of Proceedings for the hearing dated 7.2.2023, the Petitioner was directed to file its response on (i) how the incorporation of the pre-determined Change in Law relief of Rs. 0.0045/kWh for

increase/decrease of Rs. 1 lakh per MW in the Project cost would not amount to a departure from the provisions of Clause 7.8.1 of the Wind Guidelines which provides that the 'quantum & mechanism' of the compensation payment due to Change in Law shall be determined by the Appropriate Commission; and (ii) whether there has been any approval of the Appropriate Commission or any other Competent Authority for incorporation of such clause; if yes, copy thereof. In response, the Petitioner, citing pursuance of the matter with the Ministry of New and Renewable Energy, Government of India, had sought additional time to file its response on the above aspects.

4. Pursuant to the liberty granted by the Commission, Respondent No.1, ReNew Naveen Urja Private Limited ('RNUPL'), vide its reply dated 22.4.2023, has mainly raised the following aspects:

(a) In terms of Article 12.1.3 of the PPA, the Commission may declare the event namely, increase in the rate of GST (on renewable energy devices to 12% from 5%) in light of the Ministry of Finance Notification dated 30.9.2021 as a Change in Law event. As held by the Appellate Tribunal for Electricity (APTEL) in its order dated 12.10.2021 in Appeal No. 251 of 2021 (Green Infra), the Commission has the power to recognize the provisions dealing with the Change in Law events at the stage of adoption of tariff itself.

(b) The Change in Law provisions under the PPA do not have express provisions for restoration of Respondent No.1 to same financial position as provided in the Wind Guidelines. Moreover, it is also introduced after the cut-of date in order to restrict the compensation on account of the Change in Law only till actual commissioning date of last part of capacity or Scheduled Commissioning Date or extended Scheduled Commission Date, whichever is earlier, which is in teeth of the Wind Guidelines.

(c) Wind Guidelines are binding on SECI and it cannot proceed to issue the tender in conflict with such Guidelines and such deviations being without the approval of the Commission are illegal.

(d) Clause 3.2 of the Guidelines provides that in case of any deviation from the Bidding Guidelines, the procedure as stated in clause 22 shall be applicable. Clause 18 expressly states that in case of any deviation, the same shall be subject to approval of the Appropriate Commission (this Commission in the present case). However, in the case at hand, no approval for deviation has been sought by the Petitioner and the Petitioner has instead proceeded to introduce a cut- off date for the Change in Law claims as also restricted the claims in cases where LDs are payable, which is in direct conflict with the Bidding Guidelines.

(e) Bidding Guidelines are issued by the Ministry of Power under Section 63 of the Act and have the force of 'law'. Thus, any deviation from the Bidding Guidelines without the approval of the Commission is unlawful, and the provisions of the PPA to the extent being in deviation from the Bidding Guidelines are illegal.

(f) The entire purpose of having a Change in Law provision stands frustrated once the Change in Law provision fails to reconstitute the developer to the same economic position as it would have been, had the Change in Law event not occurred. The APTEL vide its Order dated 15.09.2022 in Appeal No. 256 of 2019, and batch in case of Parampujya Solar Energy Pvt. Ltd. & Ors. versus Central Electricity Regulatory Commission & Ors. dealt with the ambit and scope of the Change in Law provision. It is settled and no longer *res integra* that the Change in Law provision in the PPA is based upon the principle of restitution, a principle of equity which is generally invoked by the adjudicatory authorities – Courts and Tribunals – to render substantial justice. The Hon'ble Supreme Court vide its order dated 20.4.2023 in the case of GMR Warora Energy Limited v Central Electricity Regulatory Commission (CERC) & Ors., Civil Appeal No. 11095 of 2018 has held that law would include rules, regulations, orders, Notifications, and the generator would be entitled to compensation on the restitutionary principle on Change in Law event occurring after the cut-off date.

(d) The Commission may recognize the Article 12.1.3 & 12.2.3 at the stage of adoption of tariff itself as prayed for by SECI so as to provide regulatory certainty to the Developers that increase in rate of GST will be treated as Change in Law.

(e) As per Article 2.1.3 of the PPA, SECI was required to have the tariff adopted by the Commission by 30.10.2022. However, the tariff adoption proceedings have been delayed for a considerable period. Therefore, Respondent No.1 is entitled to corresponding extension of timeline to achieve financial closure and scheduled commissioning date equivalent to the delay from 30.10.2022 till the date of order in terms of Articles 2.1.3 & 2.1.4 of the PPA.

5. The Petitioner, SECI, in its rejoinder dated 22.8.2023 to RNUPL's reply, has mainly submitted as under:

(a) In view of the Article 12.1.3 of the PPAs and prayer (c) of the Petitioner, the Commission may pass appropriate order including with regard to change in rates of GST after 6.7.2021 being Change in Law event. However, the actual impact and extent of relief admissible need to be considered at the appropriate stage. For the application of the formula provided in Article 12.2.3 of the PPA for relief of Change in Law, the amount constituting the project cost cannot be considered on an estimate basis. The project cost will be available only upon the capital expenditure being incurred and such capital cost has been subjected to appropriate prudent check by this Commission based on all relevant factors as is considered in prudent check for the determination of tariff.

(b) There is no deviation in the Standard PPA or in the PPAs signed in terms of the Standard PPA from the applicable Guidelines of the Central Government, as alleged by Renew Naveen Urja or otherwise. Clause 7.8 of Wind Guidelines provides for basic framework for consideration of impact of Change in Law and it does not provide any mandate that impact of Change in Law on the Project cost incurred should be considered even for capital cost beyond Actual Commissioning Date/SCD/ extended SCD as the case may be. Bid documents can provide detailed provisions and Clause 5.1(c) of the Wind Guidelines itself provides that detailing of the provisions in the draft PPA will not be considered as deviations from the Guidelines. Developers having

accepted the terms of the bid documents and submitted the bid are bound by the said provisions. Similarly, there was no provision for restitution or restoration to the same economic position in the Change in Law provisions of the standards PPA and PSA and the developer duly accepted the provisions including Change in Law provisions and submitted its bid on the said basis, without any reservation or condition. The RfS which includes the Standard PPA issued as a part of the Bid documents can provide detailed provisions. The Clause 5.1 (c) (i) of the Guidelines itself provides that detailing of the provision in the Standard draft PPA will not be considered as deviation from the Guidelines.

(c) Renew Naveen Urja duly accepted the provisions of the Standard PPA before the bidding and submitted the bid on that basis. Before the bid submission date i.e. on 6.7.2021, Renew Naveen Urja was fully aware about the provision of Article 12 of the Standard PPA circulated along with the RfS document. Renew Naveen Urja duly accepted the above position without any reservation or condition when Renew Naveen Urja participated in the bidding based on the above and submitted the bid. It is well settled principle of law that having accepted the terms and conditions and having submitted the bid on the said basis, it is not open to the selected bidder to raise any issues on the same after signing the contract documents (PPA in the present case). In this regard, the reliance has been placed on the decisions of the Hon'ble Supreme Court in the cases of National High-Speed Rail Corporation Limited vs Montecarlo Limited and Another [(2022) 6 SCC 401], Har Shankar vs Excise & Taxation Commr., [(1975) 1 SCC 737], and Meerut Development Authority vs Assn. of Management Studies, [(2009) 6 SCC 171].

(d) With regard to the restitution on account of the Change in Law, before the bid submission date i.e. on 6.7.2021, Renew Naveen Urja was fully aware about the provision of Article 12 of the Standard PPA with the Change in Law provision circulated along with the RfS Document. There was no provision for restitution or restoration to the same economic position in the Change in Law provision of Standard PPA and the Standard PSA. Renew Naveen Urja duly accepted the provisions including the Change in Law provision of the Standard PPA and submitted the bid on the said basis. Further, Respondent

has also signed the PPA on 29.8.2022, which *inter-alia* incorporated the Change in Law provision based on Standard PPA without any reservation or condition. The Distribution Companies have also signed the PSA incorporating the Change in Law provision based on the Standard PSA. With regard to the reliance placed on the decisions in GMR Warora Energy Limited vs Central Electricity Regulatory Commission and Others and Parampujaya case, the same are distinguishable on facts and circumstances of the case.

(c) The Commission may pass appropriate order recognizing Article 12.1.3 and 12.2.3 of the PPAs read with Article 8.1.3 and Article 8.2.3 of the PSAs.

(d) Article 2.1.4 of the PPAs provides that if the tariff adoption order is issued by the Commission after the period specified in Article 2.1.3 (120 days from the effective date, i.e. 30.6.2022), there shall be a corresponding extension in Schedule Financial Closure and SCD for an equal number of days for which the Commission's order has been delayed beyond the period specified in Article 2.1.3.

Hearing dated 12.7.2023

6. During the course of the hearing, the learned senior counsel for the Petitioner submitted that pursuant to the Record of Proceedings for the hearing dated 11.4.2023, SECI had approached the Ministry of New and Renewable Energy (MNRE), Government of India, with regard to clarification sought by the Commission vide the said Record of Proceedings and is continuously following up the matter. As per the discussions with the officials of the MNRE, the decision in regard to the above is expected shortly. Learned senior counsel, accordingly, requested to defer the hearing to the month of August 2023.

7. The learned counsels for Respondent No.3, Green Infra Wind Energy Limited and Respondent No. 5, Adani Renewable Energy Holding Fifteen Limited, had sought time to file their replies to the Petition. Considering the request of the learned senior counsel for the Petitioner and the learned counsel for the Respondents, the

Commission directed the Respondents to file their replies and the Petitioner to file its affidavit in compliance with the directions under the Record of Proceedings for the hearing dated 7.2.2023.

8. Pursuant to the liberty granted by the Commission, Respondent No.5, Adani Renewable Energy Holding Fifteen Limited (AREHFL) vide its reply dated 25.7.2023 has objected to the present tariff adoption proceedings initiated by the Petitioner as the same being not in accordance with Wind Guidelines and thereby Section 63 of the Act. The Respondent has raised the objections mainly on the following grounds:

(a) The Petitioner insisted for the execution of PPA beyond Bid validity period and timelines as specified under RfS & LOI.

(b) The Petitioner has taken deviation from the Wind Guidelines by amending the terms of the PPA post Bid, without approval of the Commission.

(c) The Petitioner has failed to adhere the terms and conditions of Wind Guidelines- rendering the validity of PPA as null & void, and.

(d) There is an unviability of the proposed tariff in the draft PPA on account of the inordinate delay caused by the Petitioner.

9. Respondent No.3, Green Infra Wind Energy Ltd. (GIWEL), vide its reply dated 1.8.2023 has prayed to (i) declare the Ministry of Finance Notification No. 8/20210 Integrated Tax (Rate) dated 30.9.2021 as Change in Law under Article 12.1.1(v) and 12.1.3 of the PPA, (ii) Respondent is entitled to carrying cost on Change in Law compensation, and (iii) approve the dispensation provided under Article 12.1.3 and 12.2.3 of the PPA.

10. SECI, in its rejoinders dated 22.8.2023 and 26.9.2023, rejected the allegations/contentions made by the Respondents. They mainly submitted that issues on bid validity and other aspects as sought to be raised by Respondents do

not have any force in law and cannot be a basis for the Respondents to claim release from the PPA.

11. In furtherance of its earlier reply, Respondent No.1, RNUPL also filed an additional reply dated 16.10.2023 in which RNUPL has objected to the adoption of the tariff and requested to reject the present Petition on certain grounds, namely, (i) deviation to the Change in Law clause (there being no prior approval of this Commission on the said clause as incorporated in the PPA/ Bid document and the *ex post facto* approval granted by the MNRE as such have no valid existence), and (ii) Unilateral amendment to the terms of the PPA post submission of the Bid by the bidders. RNUPL has also raised the issue of substantial delay in adoption of tariff on account of inaction and default of the Petitioner.

Hearing dated 23.8.2023

12. During the course of the hearing, the learned senior counsel for the Petitioner submitted that pursuant to the Record of Proceedings for the hearing dated 7.2.2023, SECI had approached and is continuously following up on the matter with the Ministry of New and Renewable Energy (MNRE), Government of India, with regard to the clarification sought for by the Commission vide said Record of Proceedings. Learned senior counsel further submitted that MNRE, vide its letter dated 22.8.2023, has communicated that the matter is under consideration and the decision will be intimated shortly. Learned senior counsel, accordingly, prayed to defer the hearing of the matter for four weeks. Learned senior counsel sought liberty to file rejoinder(s) to the reply filed by the Respondents.

13. Considering the request of the learned senior counsel for the Petitioner, the Commission adjourned the matter. The Commission permitted the Petitioner to file

its rejoinder(s). The Petitioner was also permitted to file an affidavit in compliance with the directions under Record of Proceedings for the hearing dated 7.2.2023.

Hearing dated 18.10.2023

14. During the course of the hearing, the learned senior counsel for Respondents 1 & 5 and learned counsel for Respondents 5 & 6 made detailed submissions and vehemently opposed the adoption of the tariff on various grounds, including the bid process conducted by SECI not being in accordance with the Wind Guidelines dated 8.12.2017 issued by the Government of India. Learned counsel for Respondent 2 also objected to the adoption of the tariff by the Commission. Whereas the learned senior counsel for the Petitioner refuted the contentions made by the above Respondents and urged the Commission to adopt the tariff. Learned counsel for Respondent 3, GIWEL, supported the submissions made by the learned senior counsel for SECI and prayed to adopt the tariff. After hearing the learned senior counsels and learned counsels for the parties, the matter was reserved for order by permitting the parties to file their respective written submissions, if any.

15. Pursuant to the liberty granted by the Commission, Respondent No.5, Adani Renewable Energy Holding Fifteen Limited (AREHFL) vide its reply dated 25.7.2023 has reiterated its submissions already covered in the Petition and has mainly submitted as under:

Re: The present petition deserves an outright dismissal for non-fulfilment of the statutory obligations

(a) There are serious violations of the statutory provisions and as such the Commission cannot excise its jurisdiction to adopt the tariff. There is no prior approval of the deviations, was that in the Petition filed by SECI, there is also no prayer at all, whatsoever, seeking any *post facto* approval of deviations in the PPA with respect to the bidding guidelines and/ or SBDs.

(b) The only option available to the Commission in the present case is to dismiss the Petition for the adoption of tariff on account of the incurable violation of the statutory provisions. In any event, there is neither any prior approval nor any prayer made in the Petition for curing the said violations post facto.

(c) SECI has, this time again violated the provisions of the statute, which has been noticed by this Commission in previous proceedings and SECI has been censured/ reprimanded for the same. In this regard, reliance has been placed on the order of the Commission dated 8.3.2022 in Petition No. 211/AT/2021, in the case of Solar Energy Corporation of India Limited v. Avikiran Surya India Private Limited & Ors.,

(d) In terms of Clause 31 of the RfS, the bid validity was initially valid for a period of 240 days from the due date, i.e., till 4.3.2022. However, the same can be mutually extended by the consent of both parties. As such, SECI, vide its e-mail dated 16.2.2022 informed Respondent about extension of the bid validity up to 30.6.2022 and the same was duly accepted by Respondent vide email dated 4.4.2022 considering the provisions/ clause of RfS and standard draft PPA, shared during the bid submission stage.

(e) The project could have been commissioned in November, 2023 based upon the original timelines whereas, as on the said date, the PPA was not even in force as no regulatory seal of approval was accorded to the PPA by the appropriate Regulatory Commission.

(f) In the present case, the Petitioner, SECI, is guilty of the following violations:

Clause	Original	SECI's Modification under revised PPA shared with the Answering Respondent (Deviations)
Clause 1.2.18	This Agreement and other documents such as Request for Selection Documents, Guidelines including subsequent clarifications, amendments and further clarifications in regard to the tender shall be read in conjunction with each other and interpreted in a harmonious manner. However, in case of any mismatch/contradiction between provisions of different documents, the following shall be the order of	This Agreement and other documents such as Request for Selection Documents, Guidelines including subsequent clarifications, amendments and further clarifications in regard to the tender shall be read in conjunction with each other and interpreted in harmonious manner. However, in case of any contradiction between provisions of different documents, following shall be the order of

	<p>precedence:</p> <ol style="list-style-type: none"> 1. Power Purchase Agreement 2. RfS Documents 	<p>precedence:</p> <ol style="list-style-type: none"> 1. Prevailing rules, regulations and directives issued by Appropriate Commissions and Authorities under provisions of the Electricity Act, 2003; 2. Guidelines for the Tariff Based Competitive Bidding Process for procurement of power generated from the Grid connected Wind Power Project vide Resolution dated 8th December 2017, including subsequent amendments and clarifications; 3. Power Purchase Agreement 4. RfS Documents
Clause 3.3.3	<p>If the WPD fails to commence the supply of power from the Scheduled Commissioning Date specified in this Agreement or any further extension thereof granted by SECI, subject to conditions mentioned in Article 4.5, SECI shall encash the Performance Bank Guarantee/ POI equivalent to the amount calculated as per liquidated damages applicable under Article 4.6 as on the date of encashment without prejudice to the other rights of SECI under this Agreement. It is to be noted that the damages/dues recovered by SECI by encashing the PBG/ POI, upon the default of the WPD under the PPA, shall be credited to the payment security fund maintained by SECI under the PPA.</p>	<p>If the WPD fails to fulfil the Conditions Subsequent and/or Commission the project and commence supply of power from the Scheduled Commissioning Date specified in this Agreement subject to the provisions of Article 3.2.1, Article 3.2.2 and the conditions mentioned in Article 4.5, SECI shall encash the Performance Bank Guarantee/ POI equivalent to the amount calculated as per liquidated damages applicable under Article 4.6 as on the date of encashment without prejudice to the other rights of SECI under this Agreement. It is to be noted that the damages/dues recovered by SECI by encashing the PBG/ POI, upon the default of the WPD under the PPA, shall be transferred to the buying entity as per the terms of PSA.</p>
Clause 4.6.3	<p>The WPD further acknowledges that the amount of the liquidated damages fixed is a genuine and reasonable pre-estimate of the damages that may be suffered by SECI/Buying entity(s) as specified under this Agreement or in the PSA.</p>	<p>The WPD hereby acknowledges that the liability of the liquidated damages determined under Articles 4.6.1 and 4.6.2, on the account of delays in Commissioning/ <u>short Commissioning</u> of the project, is justified and fixed reasonable pre-estimate of the damages that may be suffered by Buying entity(s) and therefore SECI is liable to recover such liquidated damages from WPD and remit the</p>

		same to Buying Entity as per terms of the PSA.
Clause 11.5.3	The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.	The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations. Provided that such notice of the cessation of Force Majeure shall be a precondition to the Affected Party's entitlement to avail relief under this Agreement.
Clause 11.7.1 (b)	Every Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations, including but not limited to those specified under Article 4.5;	The Affected Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to performance of its obligations, Only to extent specified under Article 4.5
Clause 12.1.2extended Scheduled Commissioning Date is 01.04.2022; the Project Cost shall be determined as the cost incurred by the HPD Upto 01.04.2022.extended Scheduled Commissioning Date is 01.04.2022; the Project Cost shall be determined as the cost incurred by the HPD up to 01.04.2022.

(g) Apart from the aforesaid deviations, the Petitioner further deviated from Clause 12.1.2 of the said PPA, i.e., limiting the Change in Law claims up to the SCOD, extended SCOD or actual commissioning, whichever is earlier. The Commission vide its RoP dated 7.2.2023 highlighted one of the deviations on the aspect of the predetermined Change in Law compensation as envisaged under clause 12.2.3. Another major deviation is with respect to the ambit of Article 11.7.1(b) of the PPA, whereby SECI proceeded to substantially modify the scope and ambit of the relief clause under force majeure. Neither any prior approval was sought for such deviation by this Commission, nor any post facto approval has been sought qua the said deviation. Therefore, it is absolutely clear that SECI having monopoly in the bidding process carried out for procurement of renewable power, is abusing its dominant position by circumventing the statutory process encapsulated under the Act, thereby being contrary to Section 60.

(h) Even with respect to the so-called *post facto* approval of the MNRE for the Change in Law clause, the statute vests jurisdiction for approval of the deviations from the SBD with this Commission and not MNRE. The MNRE is not competent to give any approval to deviations of the SBDs. The failure to seek approval, in terms of Clause 22 of the Bidding Guidelines, is fatal and cannot be cured. On this ground alone, the present Petition of SECI is liable to be dismissed as there is no prior approval of deviations from this Commission. This is in addition to the fact that admittedly no prayer is made by SECI for seeking any such approval from this Commission. In support, reliance has been placed on the judgment of the Appellate Tribunal for Electricity (APTEL) dated 2.2.2018 passed in Appeal No. 235 of 2015 & Batch (DB Power Ltd. v. RERC & Ors).

(i) The contention of SECI that Respondent and other generators were aware of the bid process and as such have also proceeded to execute the PPA and as such cannot now raise any dispute in relation to the defect/errors in following the statutory process, is completely wrong and sans any merit whatsoever. While averring such baseless submission, SECI failed to take into account that the conduct of parties cannot be the basis for exercising jurisdiction by the statutory Commission. The statutory Commission's jurisdiction is governed by the provisions of the statute alone. This Commission has to examine whether or not SECI has complied with the provisions of Section 63 and the provisions of the bidding guidelines/ SBD for the exercise of jurisdiction. The collateral events relating to conduct of parties, including execution of the PPA is not the basis of exercise of jurisdiction.

(j) The present case is not a case of an ordinary tender process. In an ordinary tender process, the laws of contract apply. In those cases, the conduct of parties becomes relevant so as to fully understand the intentions of parties to the contract. The principles of waiver and acquiescence apply to those cases, depending on how the parties had conducted themselves. However, such is not the question in the present proceedings. The question in this case is about exercise of statutory jurisdiction under Section 63 of the Act. Can the Central Commission exercise statutory jurisdiction for the adoption of tariff when there is an admitted violation of the pre-requisites for the exercise

of jurisdiction, viz., (a) the bidding has to be conducted in a transparent manner, and (b) in accordance with the guidelines issued by the Central Government. In other words, can this Commission allow a situation where the laws of 'Republic of SECI' would apply, keeping aside the statutory provisions of the Act.

(k) By securing a letter from the MNRE, SECI cannot overcome the requirement of the statute, and as such, the entire process adopted by SECI is non-transparent and post facto. The test of transparency is during the bid process, and the test cannot be applied for purposes of curing otherwise fatally defective processes.

(l) SECI has violated the principles of transparency by filing a *false* "confirmative certificate" dated 30.6.2022. The said certificate *inter alia* states that the applicable guidelines and amendments/clarifications thereof, if any, issued by the Government of India for the bidding process were followed in the above tender and no deviation was taken from the guidelines in the RfS documents for the above tender. *This statement is false and misleading.* The Commission has itself taken note of similar wrong statements made by SECI in Petition No. 211/AT/2021. In this regard the Respondent has placed reliance on the judgment of the Hon`ble Supreme Court in the cases of *Cellular Operators Assn. of India v. TRAI, [reported in (2016) 7 SCC 703]* and *Global Energy Ltd. v. Central Electricity Regulatory Commission, [reported in (2009) 15 SCC 570]*.

(m) The jurisdiction of this Commission cannot be invoked where deviations of SBD have not been approved in accordance with Clause 22 of the Bidding Guidelines. Admittedly, the bid was not in accordance with the bidding guidelines and as such on this ground alone, the entire bid process fails.

(n) It is settled judicial principle that if the law requires a thing to be done in a particular manner, then the same must be done in that manner only. The Respondents have placed reliance on the judgments of the Hon`ble Supreme Court titled in the cases of *Tata Chemicals Ltd. v. Commr. of Customs,*

[reported in (2015) 11 SCC 628] and *Indira Bai v. Nand Kishore*, [reported in (1990) 4 SCC 668].

(o) During the course of the argument, it was urged that Respondent has already filed a Petition being a Diary No. 469 of 2023 (Petition No. 348/MP/2023) seeking relief in relation to and in consequence of its decision to exit from the PPA. This fact has been highlighted in the affidavit dated 17.10.2023 filed by the Respondent herein in the present Petition.

Re: SECI insisted upon the Respondent for the execution of the PPA beyond Bid validity

(p) Clause 31 of the RfS, the bid validity was initially valid for a period of 240 days from due date i.e., till 4.3.2022. Further, the timeline to execute the PPA was limited to a period of 60 days from the date of LoA in terms of Clause 21.1 of the RfS. However, the same was subject to extension but by mutually agreeing between the parties. SECI vide email dated 23.6.2022 requested Respondent to further extend the bid validity date up to 31.7.2022. However, on this occasion, Respondent did not respond to the said mail, and as such, no mutual agreement was attained amongst the parties qua extension of the bid validity. Thus, the bid validity was only up till 30.6.2022 and beyond the said date, further right was not available with SECI to insist upon the PPA execution rather it ought to have cancelled the bid. As such, on this count alone, the PPA executed between SECI and the Respondent has no sanctity and therefore is void-ab-initio.

Re: The tariff proposed under the PPA has become unviable on account of the inordinate delay caused by SECI to execute the same and to seek the adoption of tariff from this Hon'ble Commission

(q) SECI has failed to adhere to the timelines as stipulated in the RfS, as well as the Bidding Guidelines for the execution of the PPA with Respondent and corresponding PSA with the utilities, even though the Respondent at all times intimated SECI to execute the said PPA. Accordingly, the failure of SECI in delaying the execution of the said PPA, leading to the tariff being unviable.

(r) Due to inordinate delay on the part of SECI, the Respondent faced several uncertainties attached to the concerned project. One such instance was after the issuance and acceptance of the LOA, the Respondent applied for the connectivity at the identified substation. However, on account of the absence qua the signing of the PPA, the Respondent could not execute the connectivity agreement with CTUIL and therefore, the connectivity application was cancelled by CTUIL. As a consequence, Respondent cannot even avail the benefit of extension of SCOD encapsulated under Article 4.5.2 of the PPA dated 30.9.2022 executed between SECI and Respondent.

(s) On account of the huge delay, the tariff as proposed earlier, even though the bid took place in September 2021, has now become unviable and no investor is coming forward to fund the project since the tariff was quoted qua a bid two years back was based on the economics and market dynamics which prevailed at that point of time, by strictly keeping in mind the timelines of the Bid. In other words, when the bid was quoted by the Respondent, the same was done by keeping in mind the strict timelines and the effectiveness of the PPA/PSAs in terms of the said bid. However, since the PPA, till date has not become effective, the rates as provided thereunder are completely unviable. The time is the essence for the viability of any bid tariff and expected return thereby which has reached to impossibly under the present bid.

16. The Petitioner, SECI, vide its written submission/affidavit dated 4.11.2023, has mainly submitted as under:

(a) The Respondents are not entitled to raise extraneous and other aspects, excluding anything which directly relates to the prayers made, which is based on the competitive bidding held and culminated with the selection of the bidders and the due execution of the contractual documents namely Power Purchase Agreements (PPAs) and Power Sale Agreements (PSAs).

(b) Respondent Nos. 1, 2, 4 to 6,11 have raised unwarranted and baseless allegations which are not relevant for the adoption of tariff provided in the Guidelines under Section 63 of the Act. The scope of the present proceedings

being limited, such objections raised by Respondent Nos. 1,2, 4 to 6,11 are not to be considered in the present proceedings. If the Respondents have any bonafide grievance on the implementation of the PPAs duly executed by them {which in any case is not there} they need to raise through an independent proceeding post the adoption of tariff and SECI reserves the right to deal with the same in such proceedings. The present proceedings for adoption of tariff at the culmination of the competitive bid process envisaged in the guidelines cannot be a platform to urge issues on the terms of the duly executed PPAs or as an opportunity to claim unilateral termination of the duly executed PPAs.

Re: Adoption of Tariff

(c) Para 7.8 of the Guidelines deals with Change in Law provisions. The said provision under Clause 7 of the Guidelines is under the head Power Purchase Agreement (PPA). Clause 7.8 of the Guidelines provides for the indicative Change in Law provision to be incorporated in the draft PPA. However, the Guidelines do not itself provide the nature of the Change in Law provision to be incorporated. The drafting of the PPA and PSA was to be done by SECI and same was to be issued along with RfS providing the detailed terms and conditions in the draft PPA and draft PSA including the detailed provisions on the nature of clause 7 under the head Power Purchase Agreement. This has been considered by the Hon`ble Supreme Court in the case of Energy Watchdog vs Central Electricity Regulatory Commission and Others [(2017) 14 SCC 80]. In context of the above judgement of this Commission, SECI had provided for a detailed Change in Law clause in the draft PPA at Article 12 including the clause relating to the computation of effect of Change in Law in Article 12.2.3 with reference to project cost.

(d) The bids were invited on the basis of the draft PPA. In the pre-bid conference held between SECI and participating bidder, clarifications were sought. The clarification sought with reference to Article 12.1.2 was as under:

S. No.	Document	Clause No.	Existing Clause	Proposed Modifications	Rationale/ Remarks	SECI's response
26.	PPA	Clause 12.1.2	In the event of the occurrence of any of the events as provided under Article 12.1.1	In the event of the occurrence of any of the events as provided under Article 12.1.1,	Please confirm if the clause limits the right of The WPD to claim Change in Law only up to The SCD of The Project. It is suggested that The	The PPA Condition shall prevail.

		<p><i>which results in any increase/decrease in The Project Cost (i.e. cost incurred by The SPD towards supply and services only for The Project concerned, up to The Actual Commissioning Date of the last part capacity or Scheduled Commissioning Date or extended Scheduled Commissioning Date, whichever is earlier, for reasons other than those wherein such extension is on account of payment of liquidated damages, penalty or any other charges as The case may be), The WPD/ SECI / Buying Utility(ies) shall be entitled for compensation by the other party, as the case may be, subject to the condition that the such 'Change in Law' is recognized by the Appropriate Commission.</i></p>	<p><i>which results in any increase/decrease in The Project Cost (i.e. cost incurred by The SPD towards supply and services only for The Project concerned, up to The Actual Commissioning Date of the last part capacity or Scheduled Commissioning Date or extended Scheduled Commissioning Date, whichever is earlier, for reasons other than those wherein such extension is on account of payment of liquidated damages, penalty or any other charges, as the case may be), The WPD/ SECI / Buying Utility(ies) shall be entitled for compensation by The other party, as the case may be, subject to the condition that the such 'Change in Law' is recognized by the Appropriate Commission</i></p>	<p><i>Change in Law should not be limited to events only till the commissioning of the projects since we see new regulations coming in that impact the statistics of the project severely, which are beyond the control of The IPPs, such as GIB judgment by SC. Thus, it is suggested that the Change in Law event shall cover events throughout the Term of the PPA.</i></p>	
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(e) Thus, it was made abundantly clear to the participating bidders that the PPA clause will not be modified, and the bidders will have to submit their bids only in terms of the draft PPA which provided for Article 12.1.2 dealing with the impact of Change in Law compensation with regard to the project cost. In Article 12.1.2 of the draft PPA, SECI had specifically restricted the consideration of the project cost. The bidders were required to provide a specific acceptance of the following as contained in the format of Covering Letter (annexed with the RfS) to submit the bid in terms of format 7 at Clause 7 of the RfS (deals with unconditional acceptance to the RfS, standard PPA

and PSA documents, issued by SECI). Each of the bidders did give the said confirmation and participated in the bid. The letters of award were issued, the same were accepted by the selected bidders, and the PPAs were signed with the above referred Article 12.1.2.

(f) In the proceedings, when the issue arose on the consistency of the above clause with the Guidelines, SECI proceeded to obtain a clarification of MNRE. In view of the above, there can be no impediment or objection to the passing of the order of adoption of tariff by the Commission. The issues raised by the Respondents seeking oppose to the adoption of tariff by the Commission have no relevance to the present proceeding and prayers made by SECI. These aspects do not arise under exercise of power under Section 63 read with Section 79 (1)(a) and (b) of the Act to culminate the process of tariff determination by adoption of tariff discovered through competitive bid process. The tariff having been discovered through tariff bidding process the Commission adopts such tariff if the bidding process has been undertaken in accordance with law.

(g) SECI has duly complied with the process relating to the competitive bidding process, acted consistent with the Guidelines, and there is no deficiency in the course adopted by SECI. The Respondents (Developers) have duly signed the PPAs. The Buying Utilities have duly signed the PSAs. Accordingly, the Commission can proceed to pass the order adopting the tariff discovered in the competitive bidding process and also recognise the Change in Law aspect and trading margin as contained in the prayers made by SECI in the Petition. The objections raised by Respondents have no impact on the above

Re: Objections raised by Respondents - General

(h) It is well settled that bidder participating in a competitive bidding process/tender process, necessarily accepts all the terms and conditions of the tender without any reservation and is bound by the same. The bidder cannot thereafter challenge the bid terms and conditions, including that the same are contrary to any Guidelines, etc. The bidder is required to accept the bidding documents as such if it wishes to participate. It is not open to the

bidder to question any of the terms of the tender process after having being selected and after has executed the contractual documents namely the PPA.

RE: Violation of Guidelines

(i) The Guidelines, in the present case, cannot be considered as laying down of detailed steps in regard to the issue of the bid documents, conduct of the bidding process, the incorporation of terms and conditions in the bidding documents including draft PPA, etc. By its very nature Guidelines are broad Guidelines which provide for indicative clauses to be incorporated in the PPA including in regard to Change in Law. The Change in Law provision in clause 7.8 of the Guidelines, by its very nature is indicative. It does not provide for the methodology of computation of the impact of Change in Law. It is therefore, left to SECI to prescribe the details including with regard to the formula to be adopted for Change in Law compensation. It does not take away the right of SECI to prescribe the manner of applying the project cost. This includes providing what the project cost would be, i.e. defining the scope of the project cost is left to be done by the SECI.

(j) The Guidelines cannot be construed in a manner that it is a provision in the statute or a statutory rule prescribing the details and requiring the delegatee to follow the process as provided therein. Such a contention raised by the Respondents (project developers apart from Green Infra) is contrary to the scheme of Section 63 of the Act, as interpreted by the Hon`ble Supreme Court in the case of Energy Watchdog case [at para 50].

(k) The Guidelines itself envisage a clarification and modification to be made in Clause 24. The letter dated 19.09.2023 of the MNRE, Central Government at para 2 states that to convey *post facto* approval for modification in provisions regarding 'pre-determines compensation for specified Change in Law events. Thus, the approval given by MNRE, Central Government is in terms of Clause 24 of the Guidelines.

Re: Waiver and Estoppel

(l) Even assuming but not admitting that there is a deviation from following the procedure specified in the Guidelines, the Respondents (Developers) have waived the right to raise any objections in regard to the same after

having proceeded with the acceptance of the draft PPA and submission of the bid, acceptance of the Letters of Award and execution of the PPAs. It is always open to the parties to waive the same and proceed to implement, so long there is no public interest affected. The principle of waiver is well settled. Any rule can be waived in the absence of any implication to the public interest. In this regard, SECI has placed reliance on the judgment of the Hon`ble Supreme Court in the case of *All India Power Engineer Federation v. Sasan Power Ltd.*, [(2017) 1 SCC 487].

(m) Accordingly, when the participating bidders raised the issue of Article 12.1.2 of the draft PPA with regard to the Project cost in a pre-bid conference they were informed that SECI would proceed with the bidding as per the draft PPA, they continued to participate and give the bid based thereon. The bidders waived their right to object to the bid being valid on alleged violation of the guidelines. In regard to the waiver, reliance has been placed on the judgments of the Hon`ble Supreme Court in the cases of *Galada Power & Telecommunication Ltd. v. United India Insurance Co. Ltd.*, [(2016) 14 SCC 161 (paras 14 to 18)] and *Krishna Bahadur v. Purna Theatre* [*Krishna Bahadur v. Purna Theatre*, [(2004) 8 SCC 229].

(n) There is no public interest affected by virtue of the waiver in the present case. In fact, the bidding was done for the renewable energy generation. The public interest lies in implementing the PPAs and not allowing the bidders to wriggle out of the agreement reached. In the facts and circumstances of the case and for the reasons mentioned hereinabove, the Respondent Developers are estopped from raising any objections in regard to the alleged deviation in the Guidelines.

Re: PPA signed after bid validity period is not valid.

(o) The contention raised by Respondents (Developers) that the bid process/PPA is invalid as the PPA was signed after the bid validity period is baseless and without any merit. Adani had entered into the PPA on 30.12.2022 consciously and as a commercial entity it is bound by the terms and conditions contained in the PPA. Adani is not entitled to wriggle out of the duly concluded PPA. Once the PPA was duly executed, it is not open to the party to allege the existence or non-existence of the bid validity period prior to

the execution of the PPA. By the very fact of execution of the PPAs, the Respondents (Developers) accepted the bid validity till execution of the PPA. In terms of Clause 31 of the RfS, the bid validity is with reference to the submission of the bid, namely, 240 days from the submission of the bid. What is required to be done during the bid validity period is the issue of Letters of Award. The Letters of Award were issued by SECI as far back as on 21.10.2021.

(p) The Respondents (Developers) were fully aware that the procurement of the wind power under the bids is for sale to buying entities in the States. SECI is required to enter into Power Sale Agreements with the State Utilities, whereupon the PPAs can be executed with Respondent Developers. The PSAs were finalised with the buying entities on 29.4.2022 (CSPDCL), 15.6.2022 (MPPMCL), 28.6.2022 (UPPCL) and 7.11.2022 (GRIDCO). The PPAs were signed on 25.7.2022 (Anupavan), 26.8.2022 (Green Infra), 29.8.2022 (Renew), 31.8.2022 (Two Wind Energy) and 30.12.2022 (Adani). The perusal of the summary of events would clearly show that Adani had continued to deal with SECI for implementation of the PPA even after the initial bid validity date (30.6.2022). Therefore, the bid validity period cannot be raised as a ground for not implementing the PPA after the issuance of the Letter of Award and acceptance of the same by Adani. Besides accepting the Letter of Award (LOA), Adani has proceeded to submit requisite documents prior to signing of PPA and Bank Guarantee.

(q) Adani sought to raise the issue of non-extension of bid validity period by Adani at a later stage on 7.10.2022 for not signing of the PPA. SECI vide its letters dated 12.10.2022 and 23.12.2022 apprised Adani with respect to the bid validity being not valid and also that all other selected bidders have signed the PPA in July and August 2022. In the said communications dated 12.10.2022 and 23.12.2022, SECI has duly addressed the issue of bid validity raised by Adani. Thus, it is wrong on part of the Respondent, Adani to claim that it has not consented to the implementation of bid beyond the bid validity period of 30.6.2022 or otherwise the execution of PPA dated 30.12.2022 is required to be considered as null and void as alleged by Adani. The PPAs have been executed by Adani and the Respondents (Developers),

consciously and being fully aware of the Competitive Bidding Process initiated, held and concluded. The Respondents (Developers) have entered into a legally binding and enforceable PPA, which cannot be frustrated by such objections sought to be raised in regard to events prior to the PPA. The sanctity of the contract is to be maintained, and the Respondents (Developers) are obligated to perform in terms of the PPA.

RE: Alleged delay in the adoption of tariff

(r) The delay in adoption of tariff is not recognized as a force majeure event within the terms of Article 11 of the PPA. It is, therefore, not open to the Respondents (Developers) that they are entitled to terminate the PPA on account of delay in the adoption of the tariff. This is particularly when SECI had impleaded the Respondents (Developers) as a party to the proceeding before this Commission, filed on 16.11.2022 and the developers were entitled to pursue the matter related to the adoption of tariff before the Commission. The PPAs were signed in the months of July, August and December, the Petition was filed on 16.11.2022, and the matter was adjourned, awaiting confirmation by MNRE. These cannot be attributed as a delay on the part of SECI.

Re: Deviation from the bidding Guidelines

(s) SECI had duly explained to the Wind Power Developers including Adani the circumstances under which the changes were made in the draft PPA both in the joint meeting between SECI and WPDs held on 4.8.2022 as well as in SECI's communications dated 22.8.2022. In the said meeting, Developers put forth their concerns and it was decided that Developers will sign the PPAs subject to the condition that SECI may issue a written clarification with respect to few changes that were made so that the interest/obligations of the Developers can be protected. The post bid changes were acceptable to all the Developers. Further, SECI vide its letter dated 22.8.2022 issued the clarification with regard to the changes made in draft PPA and post that all selected bidders except Adani signed their respective PPAs.

(t) Post the above-referred meeting dated 4.8.2022, Adani had been in discussion with SECI for finalizing the signing of the PPA. Adani has submitted the documents required prior to the signing of the PPA and project-

specific information. Thereafter, SECI had issued various communications informing Adani that the Buying Entities/Distribution Companies are asking for copies of PPAs signed for the Projects awarded under the Tranche-XI Wind Scheme and that non-signing of the PPA is resulting in a delay in filing of the application before the Commission for the adoption of tariff under Section 63 of the Act for Projects selected under Tranche-XI Wind Scheme. Adani vide its email dated 21.9.2022 informed that it is reviewing the changes in PPA and requested time till 29.9.2022 to revert on the signing of PPA.

(u) SECI vide its communication dated 30.9.2022 and later on vide its communications dated 12.10.2022 and 23.12.2022 informed Adani that signing of the PPA for the Project awarded to Adani (450 MW) cannot be kept on hold any further as it will have direct impact on the progress of other Projects awarded under Tranche-XI Wind Scheme and that in case of failure to sign the PPA within stipulated time, SECI shall be constrained to take action as per Clause 17 of the RfS. Therefore, the same cannot be termed as threat/ coercion as Adani is well aware of provisions of RfS and accepted the LOA unconditionally on 26.10.2021. Further, SECI has been asking Adani vide its various emails starting from 17.6.2022 to submit necessary documents prior to the signing of the PPA and project specific information, which was given by Adani as late as in 22.8.2022 on account of some details not correctly provided with regard to the project interconnection/delivery point. The PPA was thereafter signed much later i.e. only on 30.12.2022 i.e. almost two months after the PSA was signed with GRIDCO on 7.11.2022. In support of its contention, SECI has placed reliance on the judgments of the Hon`ble Supreme Court in the cases of Transmission Corporation of India Ltd. ss. Sai Renewables, [(2011) 11 SCC 34]; and Gujarat Urja Nigam Limited vs Renew Wind Energy (Rajkot) Private Limited [2023 SCC OnLine SC 411].

(v) In light of the above circumstances, the claim of Adani as well as other developers that SECI had unilaterally amended the draft PPA and particularly, in any material form contrary to the Guidelines is baseless. In any event, it is not open to the Developers to raise such issues after they have duly executed the PPAs with SECI. The parties are therefore bound by terms of PPA duly signed and after such signing of PPA, it is not open for the Developers to

raise aspects related to period prior to signing of PPA as ground for termination of PPA or for rejection of the adoption of tariff proceedings. All the Developers are commercial entities and had consciously signed the PPA as per the terms contained in the PPA and cannot as an after-thought raise issues in regard to the same.

(w) It was argued by the Developers (apart from Green Infra) that the implementation of the PPA and tariff applicable as discovered through the competitive bid process is no longer viable for them. In this regard, it is well settled that occurrence of commercial difficulty, inconvenience, agreement becoming onerous to perform is not to be treated as force majeure and cannot be justification to wriggle out of the contract.

18. The Respondents, Azure Power India Limited and Two Wind Energy Private Limited in their joint written submissions dated 6.11.2023 have mainly submitted as under:

Legislative/Regulatory framework pertaining to the present case

(a) Before proceeding to analyse the issues which require adjudication by this Commission in the present Petition, it is imperative to highlight the legislative & regulatory framework in relation to seeking approval of deviation or modification respectively under the Bidding Guidelines issued by the Government of India (**Gol**) while conducting a tariff based competitive bidding, applicable in the present case.

(b) The Gol on 8.12.2017 notified the Bidding Guidelines under Section 63 of the Act. In terms of Clause 3.2 of the Bidding Guidelines, the provisions of the Bidding Guidelines are binding *inter alia* on the intermediary procurer (such as the Petitioner) and in the event of any deviation from the procedure as stipulated in the Bidding Guidelines, whilst conducting the bidding process, the procedure specified in Clause 22 of the Bidding Guidelines shall be followed. In terms of Clause 5.1(c) of the Bidding Guidelines, the procurer (i.e., the Petitioner in the present case) is required to prepare the bid documents in accordance with the Bidding Guidelines and in case, there is any deviation in the RfS, draft Power Purchase Agreement (“PPA”) and draft

Power Sale Agreement (“PSA”), from the provisions of the Bidding Guidelines, the Procurer shall (i.e., is mandated to) seek approval from the Appropriate Commission in accordance with the process envisaged under Clause 22 of the Bidding Guidelines. Additionally, even Clause 8.3 of the Bidding Guidelines provides that the bidding documents including the RfS, draft PPA and draft PSA shall be prepared by the Procurer in consonance with the Bidding Guidelines. Clause 7.8.1 of the Bidding Guidelines provides that on the occurrence of a Change in Law event, the parties (including WPD) shall be restored to the same economic position as it would have been, had the Change in Law event not occurred and the mechanism for compensation payable on such event shall be determined by the Appropriate Commission. Clause 22 of the Bidding Guidelines provides the procedure to be followed in case there is a deviation from the Bidding Guidelines. In terms thereof, if there is any deviation in the bid document/process from the Bidding Guidelines, the same ought to be approved by the Appropriate Commission within a reasonable time of 60 days. In terms of Clause 24 of the Bidding Guidelines, in case there is any difficulty - (i) in giving effect, (ii) interpretation, and (iii) modification to any provision of the Bidding Guidelines, the Ministry of New and Renewable Energy (“MNRE”) is empowered to deal with the same in consultation with the Ministry of Power (“MoP”). The approval of deviation in the bid documents (which is specific to a particular bid) from the Bidding Guidelines is exclusively bestowed upon the Appropriate Commission (i.e., this Commission, in the present case), as per Clause 22 of the Bidding Guidelines. Further, MNRE under Clause 24 of the Bidding Guidelines is exclusively empowered to deal with difficulty – (i) in giving effect; (ii) interpretation; and (iii) modification, to any provision of the Bidding Guidelines (not the bid documents).

(c) In terms of Section 63 of the Act, the Appropriate Commission (i.e., this Commission in the present case) is required to adopt the tariff provided such tariff has been determined through a transparent process of bidding in accordance with the Guidelines issued by the Gol.

(d) The Hon’ble Supreme Court in its seminal judgment of *Energy Watchdog v. CERC and Ors.* [reported as (2017) 14 SCC 80] has observed

that the Guidelines issued by the Central Government under Section 63 of the Act have a force of law. In addition, it has been also held that the Appropriate Commission whilst adopting the tariff discovered through a competitive bidding process in terms of Section 63 of the Act cannot merely act as a post office and is also *inter alia* required to see that such bidding process was in accordance with the bidding guidelines issued by the Central Government. The Hon'ble Supreme whilst relying upon the Energy Watchdog (*supra*) in *Tata Power Company Limited Transmission v. MERC and Ors.* [reported as 2022 SCC OnLine SC 1615] has held that the Appropriate Commission under Section 63 of the Act has the authority to not adopt the tariff discovered through competitive bidding process if such bidding process was *inter alia* not in compliance with the bidding guidelines issued by GoI. The APTEL *vide* its judgment dated 2.2.2018 passed in Appeal No. 235 of 2015 & Batch titled as *M/s. DB Power Ltd. v. RERC & Ors.*, wherein it was held the competitive bidding process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal and model PPA notified by the Government of India must be approved by the State Commission.

(e) In view of the above, it can be safely concluded that the Bidding Guidelines are binding in nature and any deviations in the bid documents from Bidding Guidelines ought to be approved only by the Appropriate Commission (this Commission in the present case). If the due process envisaged under the Bidding Guidelines is not followed under Section 63 of the Act, the Appropriate Commission has the power to not adopt the tariff discovered through such a bidding process.

(f) The Commission, in its order dated 22.12.2021 in Petition No. 178/AT/2021, order dated 11.4.2021 in Petition No. 260/AT/2021, order dated 6.4.2023 in Petition No. 354/AT/2022 while adopting the tariff, strongly reprimanded SECI for deviating from the Bidding Guidelines without seeking prior approval. Further, *vide* order dated 8.3.2022 in Petition No. 211/AT/2021, whilst adopting the tariff, strongly reprimanded SECI for deviating from the solar guidelines/Bidding Guidelines without following the due process envisaged under the solar bidding guidelines. Additionally, the

Commission vehemently criticized SECI's conduct in furnishing a false Conformity Certificate stating 'that the bid documents are in line with the provisions of the Guidelines' that too on an affidavit filed before this Commission. The Commission in the said order dated 8.11.2022 in Petition No. 211/AT/2021 warned SECI to mind its conduct and clearly observed that SECI has issued a false and misleading statement in terms of the Conformity Certificate issued by its representative that the bidding has been carried out in terms of the Bidding Guidelines. The same conduct has been exactly repeated by SECI yet again in the present tender (and even other tenders). This clearly shows that since SECI was only warned and no strict action was taken against it by the Commission, the warning of this Commission has not yielded any result whatsoever.

(g) SECI has been emboldened to continue with its conduct which is pure & 24 carat abuse of process of law. Thus, an example is required to be set. In this regard, the Respondents have placed reliance on the recent judgment of the Hon'ble Supreme Court dated 9.10.2023 in Civil Appeal No. 2425 of 2023 titled *Nabha Power Limited v. Punjab State Power Corporation Limited* wherein post taking note of the repeated conduct of PSPCL to flout the judgment rendered by the apex court, a cost of Rs. 65 lakh was imposed on PSPCL and in favour of two generating station(s) respectively. It's high time that this Commission adopts a similar approach in view of SECI's absolutely illegal & unfair conduct.

(h) In furtherance of RfS, SECI on 28.6.2021 issued a clarification to the queries raised by the bidders on the RfS. The bidders specifically highlighted that Clause 12.1.2 of the draft PPA, limits the right of the Wind Power Developers ("WPD") to claim Change in Law only up to the Scheduled Commission Date ("SCD") of the project and thus, the bidders suggested that the Change in Law clause should not be limited to events only till commissioning of the project and it shall cover events throughout the terms of the PPA. However, without paying heed to the query of the bidders and in utter disregard to the terms of the Bidding Guidelines, SECI issued a clarification that the "PPA conditions shall prevail".

(i) The SECI relied on this set of clarifications during the hearing on 18.10.2023 to contend that since the bidders were conveyed that the restrictive Change in Law clause in the tender documents /draft PPA, which is incomplete and stark deviation to Clause 7.8 of the Bidding Guidelines (more specifically Clause 7.8.1) is going to prevail, the bidders cannot argue otherwise or is estopped from arguing otherwise. This sort of arguments could only be made by SECI a repetitive offender who draws pride in violating the specific terms of the statutory & binding Bidding Guidelines. SECI, by way of not paying heed to Bidders' request to align the Change in Law clause in the draft PPA to what has been specified in the Bidding Guidelines, has only compounded its illegality and has further demonstrated that it can seek reward of premium on its default by contending that this aspect of non-aligning the Change in Law provision goes in its favour & against the bidders. Thereafter, the bidding process was conducted wherein Respondent No. 4 was declared as one of the successful bidders, and accordingly, SECI issued the LoA dated 21.10.2021 in favour of Respondent No. 4 for the development and establishment of the 120 MW Wind Power Project in District Koppal and Gadag in the State of Karnataka

(j) In terms of Clause 31 of the RfS, the bid submitted by the bidder was valid up to 240 days from the last date of submission of the response to RfS (i.e., 6.7.2021), accordingly bid validity was till 3.3.2022. SECI vide its email dated 16.2.2022 requested Respondents to extend the bid validity up to 30.6.2022. However, Respondents vide its letter dated 14.03.2022 extended the bid validity of the tender till 30.4.2022.

(k) The Evaluation Committee formed by the SECI submitted a Conformity Certificate dated 30.6.2022 whereby the said Committee specifically certified that no deviation was taken from the Guidelines in the RfS document of the above tender.

(l) Despite extending the bid validity date till 30.4.2022, SECI failed to execute the PPA within the bid validity period. SECI shared the final draft of the PPA with Respondent No. 4 on 8.7.2022 (i.e., after the expiry of the bid validity period). Thereafter, Respondents thoroughly assessed the changes between the draft PPA (issued along with the RfS) and the final draft of the

PPA (shared by SECI on 8.7.2022). Pursuant thereto, Respondents *vide* an email dated 2.8.2022 highlighted SECI that the final draft PPA included crucial changes that were not part of the draft PPA issued along with RfS based on which the bid was placed by Respondents. Thereafter, SECI on 4.8.2022 informed all the bidders in a meeting that the changes were made in the final draft of the PPA on the specific request of the Discoms. Further, SECI *vide* its letter dated 22.8.2022 again reiterated its stance regarding changes in the final draft of the PPA. In view of the foregoing, it is amply clear that SECI unilaterally amended the terms of the PPA post bid without even taking the Respondent's concerns into account and also without seeking approval of this Commission for such deviations carried out in the PPA.

(m) Respondent No. 4 formed a project company, i.e., TWEPL, within the provision of RfS for the development of the Project. Pursuant thereto, the PPA was executed on 31.8.2022 setting out the terms and conditions for the supply of power from the Project to the Buying Entities (through SECI) for 25 years from the Scheduled Commissioning Date. The effective date under the PPA is 30.6.2022. The contracted capacity as per the said PPA was 119 MW. However, *vide* an amendment to the PPA dated 28.11.2022, the contracted capacity increased from 119 MW to 120 MW. Accordingly, the final contracted capacity of the Project is 120 MW.

(n) As per Clause 21.1 of the RfS, the PPA was to be executed within 60 days from the date of issuance of LoA. In the present case, the LoA was issued on 21.10.2021, thus the PPA was required to be executed by 21.12.2021. However, SECI circulated the final draft PPA only on 8.7.2022 (i.e., after a delay of approximately seven months from the date when the PPA was required to be executed). Further, the PPA was executed on 31.8.2022 after a delay of almost eight months from the actual date when the PPA was required to be executed in terms of the RfS.

(o) Clause 21.1 clearly states that any extension in this proposed timeline shall be finalised/extended mutually by both the parties, i.e., SECI and WPD (i.e., the Respondents). However, while unilaterally extending the timelines, SECI chose not to consult with Respondents even once. Thereafter, on

31.1.2023, SECI vide its letter informed all the stakeholders that the originally scheduled date for achieving the financial closure and SCD had already lapsed, and accordingly, extended the effective date till the date of adoption of tariff or the date when respective SERCs approve the procurement of power from the Project.

(p) In terms of Article 2.1.3 of the PPA, SECI was obliged to obtain the adoption of tariff from the Commission, and buying utilities shall obtain approval/consent for procurement of power by respective State Electricity Regulatory Commission (“SERC”) within 120 days from 30.6.2022 (effective date), i.e., by 28.10.2022. However, SECI failed to obtain an order from this Commission approving the adoption of the tariff discovered under the RfS within the prescribed timeline, i.e., by 28.10.2020. Additionally, the buying entities, i.e., Uttar Pradesh Power Corporation Limited (“UPPCL”) and Chhattisgarh State Power Distribution Company Ltd. (“CSPDCL”), failed to obtain approval for procurement of power (within the timeline stipulated in the PPA) from the projects to be developed under the RfS. UPPCL is yet to file a petition seeking approval of procurement of 450 MW out of which 45 MW (i.e., 37.5% of the entire Project Capacity) is tied up from Respondents.

(q) SECI filed the present petition on 16.11.2022, praying for the adoption of tariff after the expiry of 139 days from the effective date (tariff is required to be adopted within 120 days from the effective date), and till date, (i.e., almost around 432 days from the execution of the PPA) the tariff which was required to be adopted by 28.10.2022 has not been adopted.

(r) Owing to the inordinate delay on the part of SECI and the Buying Entities, the Project economics has been adversely impacted, as such, the increase in repo rate, and commodity prices which got further exacerbated due to the Ukraine crises & other disruptions, has rendered the tariff discovered under the RfS, unviable.

(s) The Commission, vide its Record of Proceeding dated 8.2.2023, observed that *prima facie*, it appears that there is a deviation in the PPA from the Bidding Guidelines and, accordingly, directed SECI to *inter alia* file a response on whether there has been any approval of the Appropriate

Commission or any other Competent Authority for incorporation of such deviation on an affidavit. However, pursuant to the Commission's queries during the course of the hearing regarding no approval being sought with respect to significant restrictive changes being made in the Change in Law provision, at first, SECI tried to justify its conduct and made purported submissions conveying that effectively, there has been no deviation at all as the draft PPA prepared by it, merely involved fleshing out of the gist set out in the Bidding Guidelines. Thus, it is apparent that SECI's first attempt was to deflect and somehow, contend that there is no deviation whatsoever between the draft PPA/signed PPA and the Clause 7.8 of the Bidding Guidelines. However, somehow SECI figured out pursuant to the issuance of the RoP dated 08.02.2023 that its untenable and baseless contention has not found favour with the Commission and therefore, it was only upon issuance of the above RoP dated 08.02.2023, SECI on 15.03.2023 sought *post-facto approval* from MNRE to make deviations in the bid documents from Bidding Guidelines (purportedly under Clause 24 of the Bidding Guidelines). MNRE, vide its letter dated 19.9.2023, accorded *post-facto* approval to make deviations in the bid documents from the Bidding Guidelines and advised SECI that in future, in case any deviations are required from Bidding Guidelines, SECI should take timely steps for getting requisite approval in respect to deviation in terms of the procedural & legal requirements as per the Bidding Guidelines. It is apparent as daylight from the review of the aforesaid language of the MNRE's letter (which SECI in its latest affidavit dated 3.10.2023) has mentioned as 'modification') that even MNRE is also fed up with SECI's lackadaisical, unfair, and untenable conduct which is in complete violation of the Bidding Guidelines. This has led to the MNRE conveying to SECI unequivocally that SECI must strictly abide by the legal requirements mandated under the Bidding Guidelines in letter and spirit.

(t) The Respondents *vide* its letter and e-mail dated 17.10.2023 to SECI *inter alia* highlighted that the bidding process is in direct violation of the Bidding Guidelines, and the inordinate delay by SECI in performing its obligations under the RfS/PPA leading to the tariff discovered under the RfS becoming unviable, the tariff discovered in the present RfS cannot be adopted.

(u) The terms of the draft PPA issued by SECI along with the PPA, particularly the Change in Law provision materially and substantially deviated from the provisions of the Bidding Guidelines. Clause 7.8.1 of the Bidding Guidelines provides that upon the occurrence of a Change in Law event, the parties (including WPD) shall be restored to the same economic position as if Change in Law event had not occurred and compensation payable on such event shall be determined by the Appropriate Commission.

(v) Notwithstanding the above categorical and explicit terms of the Bidding Guidelines (which is excerpted at paragraph 6 above), the provisions stipulated in the PPA (particularly, the Change in Law provision) entail material and substantial deviations from the Bidding Guidelines. There are stark deviation(s) from the Bidding Guidelines vis a vis the Change in Law clause. The entire meaning, scope, ambit, extent, effect and objective of Change in Law clause has been entirely twisted by SECI. While narrating facts germane to the present petition, in response to the specific clarification as sought by the Commission vide RoP dated 8.2.2023, SECI proceeded to seek and thereafter submit a request for getting an *ex post facto* approval from MNRE on 15.3.2023, and the same was issued by MNRE on 19.9.2023, purportedly allowing the modification(s) of the provisions regarding Change in Law in the Tranche XI tender. This in itself fortifies the view that there are indeed deviations, as MNRE has no role whatsoever in approving bid specific deviations which is the exclusive jurisdiction of Clause 22 of the Bidding Guidelines.

(w) Where the deviation is in the draft PPA itself (which forms a part of the bidding documents), and the Guidelines contemplate approval for any such deviation from the Appropriate Commission, then it is clear that such approval is to be taken at the stage of preparation of the bid documents itself and any *post facto* approval even if obtained from the Appropriate Commission would not be in letter and spirit and will be in complete derogation of the spirit of the Bidding Guidelines. In the present case, it is evident from the above that there are material deviations from Bidding Guidelines, to effectuate the same prior approval of the Appropriate Commission (i.e., this Hon'ble Commission) under Clause 22 of the Bidding

Guidelines was quintessential. Therefore, the changes that have been made in the Change in Law clause of the PPA amount to deviations in terms of the Bidding Guidelines and thus, were required to be approved under Clause 22 of the Bidding Guidelines. Since no approval has been taken from this Commission in compliance with Clause 22 of the Bidding Guidelines, the Bidding Process, which is in contravention of the Bidding Guidelines, stands vitiated, and the present petition seeking adoption of tariff must be summarily rejected as a superstructure cannot be created once the base structure is premised on illegality and untenability.

(x) Despite the above, the Conformity Certificate dated 30.6.2022 issued by the Evaluation Committee constituted for evaluation of bids under the RfS, specifically though falsely states that the applicable Guidelines, i.e., the Bidding Guidelines were followed for the bidding process under the RfS. The Commission has previously in various tariff adoption petitions filed by SECI such observed the SECI's conduct in the issuance of Conformity Certificate certifying that no deviations were made vis a vis the Bidding Guidelines in the RfS documents (including the PPAs in those cases) and seeking post facto approval for deviations in bid documents from MNRE, is not in consonance with the Bidding Guidelines. However, SECI has been repeatedly in different tenders and the present matter as well submitted false and misleading Conformity Certificate(s), actively concealing the fact of deviating from the Bidding Guidelines while issuing Conformity Certificates to the effect that no deviations were made in RfS from the Bidding Guidelines.

(y) It is *res integra* that when facts are intentionally misrepresented by a stakeholder (i.e., SECI in the present case) to induce another stakeholder/ judicial authority (i.e., this Commission in the instant case), it amounts to fraud, which is specifically dealt with under Section 17 of the Indian Contract Act, 1872 ("*Contract Act*"). Thus, where false statements are made intentionally, with the knowledge that it is false, with a view to deceiving the other party and thereby inducing him into entering the contract, it is known as fraud. In this regard, reliance has been placed on the judgment of the Hon'ble Supreme Court in ***Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education and Ors.***, (2003) Supp (3) SCR 352,

wherein the Hon'ble Supreme Court held that fraud, misrepresentation and concealment of material fact vitiate all solemn acts. In the said judgment, it has been further held that if there appears on the part of a person, who has approached the Court, any attempt to overreach or mislead the Court by false or untrue statements or by withholding true information which would have a bearing on the question of exercise of the discretion, the Court would be justified in refusing to exercise the discretion. Without prejudice, and as a separate legal contention, it is stated that even otherwise, on the basis of the aforesaid Conformity Certificate dated 30.6.2022 is false, and therefore, this Commission cannot by any stretch adopt the tariff in the present case on the basis of said Conformity Certificate.

(z) The changes that have been made in the Change in Law clause of the PPA clearly amount to deviation(s) in terms of the Bidding Guidelines and have already been established beyond any iota of reasonable doubt, in view of the arguments advanced under the heading dealing with Issue A as well as the entire set of background submissions. SECI unilaterally amended the terms of the PPA (contrary to the Bidding Guidelines) without even taking the Respondent's/similarly placed bidders' concerns into account and also without seeking approval of this Commission for such deviations carried out in the PPA.

(za) SECI's conduct by deviating from the Bidding Guidelines (without following the due procedure, i.e., taking approval of this Commission) while issuing the tender document renders the entire bidding procedure unlawful as the competitive bidding has not been carried in terms of the Bidding Guidelines which is a pre-cursor for adopting tariff under Section 63 of the Act. Thus, any deviation from the Bidding Guidelines without the approval of this Commission is unlawful and therefore, PPA being in deviation from the Bidding Guidelines is void.

(zb) SECI's conduct in the present bidding process does not follow the due process of law as the same is not in conformity with the provisions of the Bidding Guidelines. Therefore, the tariff discovered in the present RfS cannot be adopted as the bidding process itself becomes non-est on account of not complying with the Bidding Guidelines. In this reliance has been

placed on the judgment of the Hon'ble Supreme Court in the case of **Tata Chemicals Ltd. v. Comm. Of Customs (Preventive), Jamnagar**, [(2015) 11 SCC 628].

(zc) The PPA being in deviation from the Bidding Guidelines stands void. Therefore, the same cannot be enforced. In this regard, reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of **Krishna Rai (Dead) Through legal representatives & Ors. v. Banaras Hindu University & Ors.** [(2022) 8 SCC 714].

(zd) Clause 3.2 read with Clause 22 of Bidding Guidelines categorically bestows jurisdiction, power and authority only & only upon this Commission to approve any deviation(s) from the Bidding Guideline in the bidding documents. However, the approval was sought from MNRE by SECI only in response to the specific direction of this Commission vide RoP dated 8.2.2023 to submit the approval of the Appropriate Commission or any other Competent Authority for the deviations. Instead of approaching this Commission under Clause 22 of the Bidding Guidelines prior to making such deviation, SECI approached MNRE vide letter dated 15.03.2023 seeking approval of the '**modification in the Change in Law provisions in the Bid Tranche XI tender**'. However, the Bidding Guidelines do not contemplate any approval to be granted by MNRE for such deviations

(ze) The present case cannot be treated as one of seeking a clarification or modification of the Bidding Guidelines. Since the present case involves deviation(s) from the Bidding Guidelines in a particular bidding document (i.e., with respect to Tranche XI bidding), which could only have been carried out by following the procedure as laid down in Clause 22 of the Bidding Guidelines i.e., approval from this Commission and under no circumstances, it could have approached MNRE, purportedly under Clause 24 of the Bidding Guidelines and MNRE does not have any authority to approve deviations from the Bidding Guidelines in the name of terming it modification. SECI's conduct in approaching MNRE in itself a fraud on the Bidding Guidelines and is a step towards undermining the majesty of this Commission. None other than this Commission itself can (and ought to) protect its own majesty.

(zf) MNRE under Clause 24 is exclusively empowered to deal with difficulty- (i) in giving effect; (ii) interpretation; and (iii) modification, to any provision of the Bidding Guidelines (not the bid documents). The modification in the Bidding Guidelines is required to be done on a generic and broad level applicable to all stakeholders and is not restricted to any particular bid. The present case cannot be treated as one of seeking a clarification or modification of the Bidding Guidelines. Since the present case involves a deviation from the Bidding Guidelines, it could only have been carried out by following the procedure as laid down in clause 22 of the Bidding Guidelines.

(zg) SECI has consistently in various Petitions (seeking adoption of tariff) sought *ex-post facto* approval for deviations in bid documents from the Bidding Guidelines. The fact that SECI sought post-facto approval from MNRE in itself shows that there has been deviation(s) from the Bidding Guidelines which could have only been approved by this Commission.

(zh) SECI's conduct in the present bidding process is illegal as the same is not in conformity with the due process of law. Therefore, the tariff discovered in the present RfS must not be adopted as it is established from the contentions raised above that the bidding process is itself illegal, from the very inception. In support of this contention, reliance has been placed on the judgment passed by the Hon'ble Supreme Court in the case of **Indira Bai v. Nand Kishore** [(1990) 4 SCC 668], wherein the Hon'ble Supreme Court held that which is statutorily illegal, and void cannot be enforced by restoring to the rule of estoppel. The relevant excerpt of the said judgement is reproduced hereinbelow:

(zi) The entire bidding process culminating in the conclusion of the bid and execution of the PPA does not have any sanctity in the eyes of law. Accordingly, the present Petition for the adoption of a tariff that has resulted from the present bidding process ought to be dismissed. In this regard, reliance has been placed upon the legal maxim, *sublato fundamento cadit opus*, meaning thereby that the foundation being removed is removed, and the superstructure falls, which was discussed by the Hon'ble Supreme Court in the case of **Chairman-cum-Managing Director, Coal India Limited and Ors v. Anata Saha and Ors**, [(2011) 5 SCC 142], wherein the Hon'ble Court

held that if the initial action is not in consonance with law, subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root. Thus, in the present case, where the foundation i.e., the bidding process does not survive and is in violation of the Bidding Guidelines, all subsequent actions including the execution of the PPA are also bad in law and cannot sanctify the irregularity and enforced.

(zi) In alternate, holistic reading of the terms of the PPA, it is clear that the parties under the PPA did not envisage an indefinite extension or deferment of the SCD beyond a reasonable time period, and envisaged short-closure or termination of the PPA where SCD goes beyond such reasonable timelines. Such a construct is predicated on the fact that *time is of the essence* for the PPA and that the underlying commercials and equilibrium are severely prejudiced when there are inordinate delays affecting project execution. Huge delay in tariff adoption has led to the substratum being eroded, which is in addition to events such as the Ukraine war which have also led to exponential increases in prices of various materials necessary for the execution of the Project. It is relevant to note that on account of such inordinate delay, the tariff discovered earlier through bidding that took place on 02.09.2021, has now become unviable and in consequence, Respondents are facing challenges to lure investors to fund the project.

(zj) It is unequivocally clear that if the tariff in the present Petition is adopted the same will perpetuate illegality and will be tantamount to sanctioning SECI's conduct in lowering the majesty of this Commission. Having said that, it is imperative to note that even though this Commission has condoned similar illegal conduct of SECI merely by giving strong observations reprimanding such conduct in its earlier orders, it does not bind this Commission to adopt the tariff in the present Petition as well, specifically in view of the fact that no such objections (as submitted by the Respondents in the present Petition) to the adoption of the tariff were taken by the respondents therein.

19. Respondent No.1, ReNew Naveen Urja Private Limited (RNUPL) vide its written submission dated 6.11.2023, has mainly submitted as under:

(a) The Petitioner has failed to adhere and comply with the Bidding Guidelines issued under the aegis of Section 63 of the Act and has thereby rendered the entire bidding process, culminating in the discovery of tariff under Section 63 of the Act as void.

(b) In the present case, there are two deviations from the Bidding Guidelines which have been detailed as under:

(i) The Petitioner has introduced a Change in Law clause under the PPA which incorporates a pre-determined Change in Law relief of Rs. 0.0045/kWh for increase/decrease of Rs. 1 lakh per MW in the Project Cost. Such clause is a variation from the 'Change in Law' clause as envisaged in the Bidding Guidelines.

(ii) The Petitioner has proceeded to unilaterally amend the terms of the PPA, post bid submission, including the addition of certain extraneous conditions in the clauses relating to force majeure, thereby leading to a situation where the draft PPA submitted with the RfS is at variation with the draft PPA submitted post submission of the bid.

(c) The Petitioner has proceeded with the aforementioned deviations without following the due process of law as provided in the Bidding Guidelines in relation to such deviations. In other words, in disregard of the terms of the Bidding Guidelines, specifically clause 22 read with clause 5.1(c) of the Bidding Guidelines, the Petitioner has proceeded to deviate from the Bidding Guidelines without seeking a prior approval of the Commission.

(d) In terms of the clause 7.8.1 of the Bidding Guidelines, it is clear that in case of Change in Law, the Bidding Guidelines explicitly provide that the quantum and mechanism of compensation payment shall be determined and effective from the date as may be decided by this Commission. However, in complete contradiction, the Change in Law clause, i.e. Article 12.2.3, which formed a part of the draft PPA which was submitted with the RfS itself, specifically indicated a pre-determined relief for Change in Law, thereby leading to a situation where the parties would not be required to approach the Appropriate Commission for determining the quantum and mechanism of payment.

(e) In response to the specific clarification sought by this Commission vide Order dated 7.2.2023, the Petitioner proceeded to seek and thereafter submit an ex-post facto approval issued by the MNRE, purportedly allowing the modification of the provisions regarding Change in Law in the Tranche XI tender which also fortifies the view that there is a deviation in the lines contemplated above. Since no approval has been taken from this Commission in compliance with clause 22 of the Bidding Guidelines, such Bidding Process is in contravention of the Guidelines and thereby stands vitiated.

(f) The approval obtained from the MNRE which was submitted belatedly by the Petitioner was also only in response to the specific direction of this Commission, vide Order dated 7.2.2023. Upon being directed by this Commission to submit the approval of the Appropriate Commission or any other Competent Authority for the deviations, the Petitioner, then, proceeded to apply for an approval from MNRE vide letter dated 15.3.2023 and consequently proceeded to submit the said approval vide affidavit dated 11.10.2023. Instead of approaching this Commission under clause 22 of the Bidding Guidelines, the Petitioner has proceeded to approach MNRE vide Letter dated 15.3.2023 seeking approval of the 'modification in the Change in Law provisions in the Bid Tranche XI tender'. However, the Bidding Guidelines do not contemplate any approval to be granted by MNRE for such deviations. That apart, clause 24 of the Bidding Guidelines contemplates that in case of any difficulty arising in giving effect to the provisions of the Guidelines or interpretation of the Guidelines or Modification of the Guidelines, MNRE is empowered to clarify or modify the Guidelines in consultation with the Ministry of Power. The present case cannot be treated as one of seeking a clarification or modification of the said Guidelines. Since the present case involves a deviation from the Bidding Guidelines, it could only have been carried out by following the procedure as laid down in clause 22. In support, reliance has been placed on the judgment of the Hon`ble Supreme Court in the case of *Tata Chemicals Ltd. v. Comm. Of Customs (Preventive), Jamnagar*, [(2015) 11 SCC 628], whereby it has been that if the law requires that something be done in a particular manner, it must be done in

that manner, and if not done in that manner has no existence in the eye of the law at all.

(g) The Petitioner has also proceeded to unilaterally amend the terms of the PPA after the completion of the bidding process. Such unilateral amendments to the terms of the PPA are in complete violation of the Bidding Guidelines and also tantamount to deviation from the bidding process. As per the Guidelines, the draft PPA ought to be in accordance with the Bidding Guidelines. However, where the draft PPA submitted as a part of the bidding documents is itself at variance with the final PPA, on account of unilateral amendments by the Petitioner after the bid submission which is in complete contravention of the Bidding Guidelines and results in a deviation in the Bidding Process.

(h) The Petitioner has also proceeded to unilaterally amend the 'Force Majeure' clause as well, thereby proceeding to add an additional extraneous condition which had not been contemplated within the 'Force Majeure' clause submitted with the draft PPA enclosed with the RfS. Such proviso which makes the relief under Force Majeure subject to such pre-condition was wholly absent in the draft PPA shared at the time of submission of the bid.

(i) As per clause 31 of the RfS, the bid was valid for a period of 240 days from the due date, i.e., 4.3.2022. However, as per clause 7.10, the same can be mutually extended. Vide letter dated 16.2.2022, the Petitioner issued an email dated 16.2.2022 for extension of bid validity up to 30.6.2022, which was accepted by Respondent vide email dated 4.4.2022. Thereafter, the Petitioner once again requested for extension of bid validity vide email dated 23.6.2022. However, the Respondent did not respond to the said mail, and as such, there was no mutual consensus for the extension of the bid validity. Thus, since the bid validity was not extended beyond 30.6.2022, the PPA ought not to have been executed beyond the said date and instead ought to have been cancelled.

(j) The inordinate and unprecedented delay in adoption of tariff i.e., a delay of almost 365 days from the outer limit within which a tariff is required to be adopted as per the terms of the PPA, has rendered the tariff as well as the

execution of the Project as wholly unviable. On account of such delay in adoption of tariff, Respondent has also been legally advised to terminate the Project on grounds of force majeure and on account of default of the Petitioner, and the Respondent is duly contemplating the same.

(k) On a holistic reading of the terms of the PPA, it is clear that the parties under the PPA did not envisage an indefinite extension or deferment of the SCD beyond a reasonable time period, and in fact, envisages short-closure or termination of the PPA where SCD goes beyond such reasonable timelines. Such a construct is predicated on the fact that time is of the essence for the PPA and that the underlying commercials and equilibrium are severely prejudiced when there are inordinate delays affecting project execution.

(l) Due to the inordinate delay in the adoption of tariff due to the reasons attributable to the Petitioner, the tariff quoted by Respondent No. 1 in the year 2021 at the time of bid submission is no longer viable in the year 2023, particularly since there has been a delay in adoption of tariff of 822 days from the date of bid submission and a delay of 724 days from the date of issuance of the Letter of Award.

(m) Throughout the proceedings, the Petitioner has maintained that since Respondent has signed the PPA, it has waived its right to claim deviations from the Bidding Guidelines. It is a well-settled principle of law that waiver does not operate and cannot be given effect to if there is an element of public interest and if the same is contrary to such public interest. In this regard, reliance has been placed on the Judgments of the Hon`ble Supreme Court in the cases of *All India Power Engineer Federation and Others v. Sasan Power Limited and Others* [(2017) 1 SCC 487], *Lachoo Mal v. Radhey Shyam*, [(1971) 1 SCC 619] and *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, [(1999) 1 SCC 492].

20. Respondent No.2, Anupavan Renewables Private Limited (ARPL), vide its written submission dated 6.11.2023, has mainly reiterated the submissions regarding deviation being taken by the SECI from the bidding guidelines and inordinate delay in the adoption of tariff on account of the inaction and default of the Petitioner which

are covered above in the written submission of the Respondent No.1, ReNew Naveen Urja Private Limited (RNUPL) dated 6.11.2023 and therefore, not reiterated for the sake of brevity.

21. Respondent No.3, Green Infra Wind Energy Ltd. (GIWEL) vide its written submission dated 11.12.2023, has mainly submitted that the construction of the Project of GIWEL is in advance stages and the Project is expected to be commissioned around June 2024. It has been further submitted that the project has made significant progress in construction and development of the Project (as detailed in the reply). Therefore, the Commission may take note of the *bona-fide* progress made by GIWEL towards the construction of the Project and pass an appropriate order, such that, irrespective of the outcome of the present petition, no harm and loss is caused to GIWEL and the Project, for no fault of GIWEL, whether by way of revocation of the connectivity by the CTUIL, or otherwise.

Analysis and Decision

22. We now proceed to consider the prayer of the Petitioner as regards the adoption of tariffs under Section 63 of the Act in respect of the individual wind projects discovered pursuant to the competitive bid process carried out in terms of the Guidelines issued by the Government of India.

23. In terms of Section 63 of the Act, the Commission is required to adopt the tariff, upon being satisfied that the transparent process of bidding, in accordance with the guidelines issued by the Central Government under the said section, has been followed in the determination of such a tariff.

24. The Ministry of Power, Government of India has notified the Guidelines under Section 63 of the Act vide Resolution No.23/54/2017-R&R on 8.12.2017. The said

Guidelines have been subsequently amended vide Resolution dated 16.7.2019. The salient features of the Guidelines are as under:

(a) Guidelines are applicable for procurement of power by the Procurers from the grid connected wind power projects having, (a) individual size of 5 MW and above at one site with minimum bid capacity of 25 MW for intra-State projects; and (b) individual size of 50 MW and above at one site with minimum bid capacity of 50 MW for inter-State projects through tariff based competitive bidding to be conducted by the procurers which include distribution licensee, or the authorized representative(s), or intermediary procurers.

(b) The Procurer shall prepare the bid documents in accordance with the Guidelines and the Standard Bid Documents notified by the Ministry of Power, Govt. of India. If any deviation is proposed to be made in the Guidelines and Standard Bid Documents, approval of the Appropriate Commission would be necessary, Intimation about initiation of the bid process shall be sent by the Procurers to the Appropriate Commission.

(c) Bids shall be designed in terms of total wind power capacity to be procured in MW. For intra-State projects, minimum bid shall be 25 MW with at least 5 MW project at one site and for inter-State projects, minimum bid shall be 50 MW at one site. Procurer may choose to specify the maximum capacity that can be allotted to a single bidder including its affiliates.

(d) The Procurer has option to choose from two kinds of tariff based bidding, namely, (i) fixed tariff in Rs./kWh for 25 years or more, or (b) escalating tariff in Rs./kWh with pre-defined quantum of annual escalations fixed in Rs./kWh and number of years from which such fixed escalation will be provided.

(e) Draft PPA proposed to be entered into with the successful bidder and the draft PSA, if applicable, shall be issued along with the RfS. PPA period shall not be less than 25 years from the date of Scheduled Commissioning Date.

(f) Wind Power Developers will declare the annual CUF of its Project at the time of signing of the PPA and will be allowed to revise the same once within first year of COD. The declared annual CUF shall in no case be less than 22%.

(g) The Procurer and Intermediary Procurer shall provide payment security to the Wind Power Developer through revolving Letter of Credit of an amount not less than one month average billing and the Payment Security Fund for at least three months billing of all the projects. In addition, the Procurer and Intermediary Procurer may also choose to provide the State Government Guarantee.

(h) The End Procurer shall provide payment security to the Intermediary Procurer through revolving LC of an amount not less than one month`s average billing from the project under consideration and State Government Guarantee. In addition, the end Procurer may also choose to provide the Payment Security Fund with three months bills of all the projects tied up with such fund.

(i) The Procurer shall call the bids adopting a single stage bidding process to be conducted through electronic mode (e-bidding). The Procurers may adopt e-reverse auction, if it so desires, For this purpose, e-procurement platforms with a successful track record and with adequate safety, security and confidentiality features will be used.

(j) The RfS notice shall be issued in at least two national newspapers and on websites of the Procurer to provide wide publicity. Standard documentation to be provided in the RfS Stage shall include technical criteria, financial criteria, quantum of earnest money deposit and lock-in-requirements for the lead members of the consortium.

(k) The Procurer shall constitute committee for evaluation of the bids, with at least three members, including at least one member with expertise in financial matters/bid evaluation.

(l) Bidder shall submit non-refundable processing fee and/or project development fee as specified in the RfS, separate technical and priced bids and bid guarantee. To ensure competitiveness, the minimum number of qualified bidders shall be two. If the number of qualified bidders is less than two, even after three attempts of bidding, and the Procurer still wants to continue with the bidding process, the same may be done with the consent of the Appropriate Commission.

(m) PPA shall be signed with the successful bidder/ project company or an SPV formed by the successful bidder. After conclusion of the bidding process, the Evaluation Committee shall evaluate the bids and certify that the bidding process and the evaluation have been conducted in conformity with the provisions of the RfS. After execution of the PPA, the Procurers shall disclose the name(s) of the successful bidder(s) and the tariff quoted by them in its website. Accordingly, the distribution licensee or the intermediary Procurer shall approach the Appropriate Commission for the adoption of tariff in terms of Section 63 of the Act.

25. In terms of the provision of Section 63 of the Act, we have to examine whether the process as per the provisions of the Guidelines has been followed in the present case for arriving at the lowest tariff and for the selection of the successful bidder(s).

26. The Petitioner has been designated as the nodal agency for the implementation of the MNRE Schemes for setting up the inter-state Transmission Systems connected/ State specific wind/ solar power/ winder-solar hybrid power projects, invite bidding under tariff-based competitive bidding process, entering into PPAs with developers at the tariff discovered in the competitive process, and enter into the PSAs with the distribution licensees to enable them to fulfil their Renewable Energy Purchase Obligations under Section 86(1)(e) of the Act. SECI acts as an intermediary agency in the purchase and sale of power under the PPAs and PSAs on a back-to-back basis.

27. The Wind Guidelines provide the framework for long-term procurement of wind power at a tariff to be determined through a transparent process of bidding by the procurer(s) from ISTS- connected Wind Power Projects. As per the Wind Guidelines, SECI, in its capacity as an intermediary procurer, invited the proposal for setting up the ISTS connected Wind Power Projects (Tranche- XI) on a "Build Own Operate" basis for an aggregate capacity of 1200 MW and for the procurement of Wind power

from the Projects being set-up in relation thereto. As per the arrangement, SECI is to procure power by entering into PPAs with the successful bidder with back-to-back PSAs for the sale of power to the distribution licensees.

28. The key milestones in the bidding process were as under:

S. No.	Particular	Details
1.	Last date of Bid Submission	06.07.2021
2.	Opening of Techno-Commercial Bid	09.07.2021
3.	Opening of Financial Bid	31.08.2021
4.	e-Reverse Auction Conducted	02.09.2021
5.	Issuance of Letters of Award (LoAs) to successful bidders	21.10.2021

29. As per Clause 5.1(b) of the Guidelines, the SECI is required to inform the Appropriate Commission about the initiation of the bidding process. In this regard, SECI vide its letter dated 31.5.2021 had informed the Commission that it had initiated the competitive bidding process for the procurement of power from grid connected wind power projects under the RfS dated 25.5.2021.

30. The Bid Evaluation Committee (BEC) comprising the following was constituted for opening and evaluation of the bids under RfS-No. SECI/C&P/WPD/1200MW/TII/RfS/052021 dated 25.5.2021:

Tender	Dept.	Offline and Online Techno-commercial and Financial Bid Opening	Techno-commercial and Financial evaluation and post-e-RA recommendation
1200 MW ISTS-connected Wind Power projects (Tranche-XI)	PS	Anita Mohan Goel, Sr. Manager	Aditee Nitnavare, Dy Manager
	Contracts	Jayansh Gaur, Sr. Engineer	Pratik Prasun, Manager
	Finance	Mohit Singhal, Sr. Accounts Officer	Ajit Sharma, Dy. Manager

31. On 25.5.2021, SECI issued the Request for Selection document, along with the Standard PPA and PSA documents for setting up the 1200 MW ISTS-connected Wind Power Project (Tranche- XI). The proposal was to establish the ISTS-

connected Wind Power project on a “Build Own Operate” basis for an aggregate capacity of 1200 MW.

32. The last date of submission of the bid was 6.7.2021, and the technical part of the bid was opened on 9.7.2021. The response to the RfS was received from the 11 (eleven) bidders, and all of them met the technical criteria and, consequently, were found to be qualified for the opening of the financial bid. On 31.8.2021, financial bids of the eleven (11) technically qualified bidders were opened on the ISN ETS e-bidding portal in the presence of a member of the Bid Evaluation Committee. As per the eligibility criteria mentioned in the RfS document, ten (10) bidders, aggregating to 2610 MW were shortlisted for the e-reverse auction.

33. The e-reverse auction was carried out on 2.9.2021 on the ISN ETS e-bidding portal. After the completion of an e-reverse auction, the following were declared the successful bidders:

S. No.	Bidder's Name	Bidder's Quantity (MW)	Tariff (INR/kWh)	Awarded capacity (MW)
1.	ReNew Naveen Urja Private Limited	300	2.69	300
2.	Green Infra Wind Energy Limited	180	2.69	180
3.	Anupavan Renewable Private Limited	250	2.69	150
4.	Adani Renewable Energy Holding Fifteen Limited	450	2.70	450
5.	Azure Power India Pvt. Ltd.	300	2.70	120
Total awarded capacity (MW)				1200

34. After the conclusion of the e-reverse auction and the determination of the tariff, SECI issued a Letter of Award to the selected bidders on 21.10.2021 as under:

S. No.	Bidder's Name	Tariff (INR/kWh)	Awarded capacity (MW)
1.	ReNew Naveen Urja Private Limited	2.69	300
2.	Green Infra Wind Energy Limited	2.69	180
3.	Anupavan Renewable Private Limited	2.69	150

4.	Adani Renewable Energy Holding Fifteen Limited	2.70	450
5.	Azure Power India Pvt. Ltd.	2.70	120
Total Awarded Capacity (MW)			1200

35. The relevant portion of the Letter of Award issued to one of the successful bidders, namely, Adani Renewable Energy Holding Fifteen Limited, is as under:

“Sub: Selection of Wind Power Projects under RfS for setting up of 1200 MW ISTSconnected Wind Power Projects (Tranche-XI): Letter of Award for Wind Power Project of 450 MW (Project ID: WPD-ISTS-T11-AREHFL-P1-450MW)

...

Ref: This has reference to the following:

A. The "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects" vide Gazette Resolution dated 08.12.2017, including subsequent amendments and clarification thereof, if any, issued, until the last date of bid submission of the RfS, by Ministry of Power (MoP) (herein referred to as "Guidelines");

B. The Request for Selection (RfS) document vide RfS no. SECI/C&P/WPD/1200MW/T11/RfS/052021 dated 25.05.2021 including draft Power Purchase Agreement (PPA), draft Power Sale Agreement (PSA) and subsequent amendments/ clarifications/ revisions/ notifications issued by Solar Energy Corporation of India Limited (SECI) and uploaded during the process of RfS on ETS portal (<https://www.v.bharat-electronictender.com>);

C. Your response to the RfS document uploaded on ETS portal vide Organization ID (ETS-IN-2020-RS0000283) against RfS for Setting up of 1200 MW ISTS-connected Wind Power Projects (Tranche-XI);

D. Your Final tariff (INR/kWh) at the end of the e-Reverse Auction conducted on ETS portal on 02.09.2021 for the referred RfS for selection of ISTS-connected Wind Power Projects.

In reference to above and subject to the provisions of RfS, we confirm having accepted your final offer concluded as a result of e-RA and issue this letter of award as per the following details:

<i>Allotted Project ID</i>	<i>Project Capacity (MW)</i>	<i>Interconnection Point Details</i>	<i>Applicable Tariff (INR/kWh) in figures</i>	<i>Applicable Tariff (INR/kWh) in words</i>
<i>WPD-ISTS-T11-AREHFL-P1-450MW</i>	<i>450</i>	<i>440/220 kV Koppal Pooling Station</i>	<i>Rs. 2.70/-</i>	<i>Rupess Two and seventy paisa only</i>

It is to be noted that the WPD is allowed to change the project location and interconnection point for the awarded project subsequent to issuance of LoA as per the provisions of the RfS.

SECI shall purchase the power generated from the proposed ISTS-Connected Wind Power Project under the above scheme subject to the following terms and conditions as stated in various documents referred above and briefly brought out hereinafter.

- 1.0 The applicable tariff as mentioned above for power generated from the proposed Wind Power Project for the term of Power Purchase Agreement (PPA) to be entered into between Project Company or the Wind Power Developer (WPD) and M/s SECI, for the Project, shall be firm for the entire term of the PPA.
- 1.1 The WPD will be free to avail fiscal incentives like Accelerated Depreciation, Concessional Customs and Excise Duties, Tax Holidays, etc. as available for such projects. No claim shall arise on SECI for any liability if the WPD is not able to avail fiscal incentives and this will not have any bearing on the applicable tariff.
- 1.2 The award of the above Project is subject to the Guidelines including amendments/ clarifications issued by Government of India and terms and conditions of the RfS document including its clarifications/ amendments / elaborations / notifications issued by SECI.
- 1.3 No change in the controlling shareholding of the Bidding Company or Bidding Consortium shall be permitted from the date of submission of response to RfS till the execution of the PPA. However, in case the Project is being set up by a listed Company, this condition will not be applicable.
- 1.4 In case of the selected Bidder itself executing the PPA, it shall ensure that its promoters shall not cede control (Control shall mean the ownership, directly or indirectly, of more than 50% of the voting shares of such Company or right to appoint majority Directors), till 01 (one) year after the COD, except with the prior approval of SECI. However, in case the Project is being set up by a listed Company, this condition will not be applicable.
- 1.5 In case of companies having multiple promoters (but none of the shareholders having more than 51% of voting rights and paid-up share capital), it shall be considered as a company under joint control. In such cases, the shareholding pattern in the company as submitted at the time of bidding, shall be maintained for a period of 01 (one) year after COD.
- 1.6 In case of Project being executed through SPVs, the selected Bidder executing the project, if being a single company, shall ensure that its shareholding in the SPV/project company executing the Power Purchase Agreement (PPA), shall not fall below 51 % at any time prior to 1 (one) year after the COD, except with the prior approval of SECI. In the event the selected bidder is a consortium, then the combined shareholding of the consortium members in the SPV/project company executing the PPA,

shall not fall below 51% at any time prior to 1 (one) year after COD, except with the prior approval of SECI. However, in case the Project is being set up by a listed Company, this condition will not be applicable.

- 1.7 The WPD shall pay to SECI, Success Charges of Rs. 1 Lakh/MW + 18% GST within 30 days of issuance of LoA or the date at least 07 days prior to the date of signing of PPA (PPA signing date to be intimated by SECI), whichever is earlier, in line with Clause 19.1 of the RfS, towards administrative overheads, coordination with State Authorities and others, Discom/ STU/ CTU, pre-commissioning and commissioning expense. Performance Bank Guarantee(s)/ Payment on Order Instrument (POI) for a value of @ Rs 12 Lakh/MW/Project shall be submitted by the WPD by the date at least 07 days prior to signing of PPA (PPA signing date to be intimated by SECI), in line with Clause 18 of the RfS.
- 1.8 PPA will be executed between SECI and the WPD as per the breakup of the cumulative Project capacity awarded to the Bidder. This LoA is being issued in line with the Project breakup of the cumulative capacity quoted in the Covering Letter as part of your response to RfS and amended subsequently, as applicable.
- 1.9 The final project configuration, adding up to the cumulative capacity awarded to the bidder may be intimated to SECI at the time of signing of PPA, which shall then remain unchanged subsequent to signing of PPA. Delays in connectivity and/or LTA for the Project(s) on account of such changes in Project parameters, which differ from the details provided in the Covering letter, shall be at the risk and cost of the Successful Bidder. The PPAs shall be valid for a period of 25 years from the scheduled commissioning date or from the date of full commissioning of the projects, whichever is earlier.
- 1.10 The WPD will have to submit the required documents as mentioned below to SECI within 40 days from the issue of this LoA. In case of delay in submission of documents beyond the timeline as mentioned above, SECI shall not be liable for delay in verification of documents and subsequent delay in signing of PPA:
- a. Copy of the Certificate of Incorporation of the WPD.
 - b. The details of promoters and their shareholding in the WPD, duly certified by the practicing Chartered Accountant/ Company Secretary in original at least 7 (seven) days prior to date of their document submission (certificate date should be after the date of LoA) along with latest documents filed with ROC.
 - c. Copy of the Memorandum of Association (MoA) of the WPD highlighting the object clause related to generation of Power/ Energy/ Renewable Energy/ Wind Power plant development.
 - d. In case the project being executed by a Special Purpose Vehicle (SPV) incorporated by successful bidder, such SPV shall be atleast 51 % shareholding subsidiary, in line with provisions of the RfS. Further, the Successful Bidder shall submit a Board

Resolution prior to signing of PPA with SECI, committing total equity infusion in the SPV as per the provisions of RfS.

- e. *Copy of Board Resolution for authorization of signing of PPA and subsequent relevant documents.*

Further, the PPA shall be signed with WPDs subsequent to the signing of Power Sale Agreements with the Buying Entities for the cumulative awarded capacity and upon submission of the Success Charges along with total Performance Guarantees/ Payment on Order Instrument of requisite value. In addition to the above, the Successful Bidder shall also submit a detailed L-2 Schedule for the Project prior to the signing of PPA. Broad details to be captured in the Schedule are the land procurement; order, supply and erection status of various Project components; financial arrangement/ tie up etc. SECI shall provide the standard L-2 Schedule template to the Successful Bidder after the issuance of LoA.

- 1.11 *SECI shall have the right to verify original documents of the WPD for which copies have been submitted from the date of submission of response to RfS till date, if required. PPA as per the format given along with RfS has to be signed within 60 days from the date of issue of this LoA, if not extended by SECI. In case of delay on the part of the WPD in submission of requisite documents prior to signing of PPAs or otherwise, then irrespective of the date of signing of PPA, the Effective Date of the PPA shall be the date as on 60 days from the date of issue of LoA. In extraordinary cases of unavoidable delay on the part of SECI in signing the PPAs, the effective date of PPA shall be the date of signing of PPA.*
- 1.12 *In case. the SECI offers to execute the PPA with the WPD and the selected Bidder refuses to execute the PPA within the stipulated time period, then the selected Project shall stand cancelled, and provisions of Clause 17 of the RfS will be applicable, and the selected Bidder expressly waives off its rights and objections, if any, in that respect.*
- 1.13 *The WPD shall meet financial closure requirements for the Project in line with clause 22 of the RfS document, within 07 (seven) months from the Effective Date of the PPA. Accordingly, the WPD shall furnish the documents pertaining to compliance of financial closure as per the above provisions.*
- 1.14 *The WPD/Project Company shall achieve commissioning of full capacity of the Project within 18 months from the Effective Date of the PPA or from the Effective Date of PSA, whichever is later, as per the conditions stipulated in Clause 9 of the RfS and relevant articles of PPA. In case of failure to achieve this milestone, liquidated damages not amounting to penalty shall be levied on the WPD as per the above provisions.*
- 1.15 *You are requested to make it convenient for signing of Power Purchase Agreement (PPA) as per clause 21 of RfS, failing which, provisions as per Clause 17, 18 and 21 of the RfS shall be applicable.*

1.16 All disputes arising out of and/ or in connection with the selection of Wind Power Projects under the said RfS and execution of PPA thereto shall be governed by laws of India and shall be subject to the jurisdiction of Courts of New Delhi.

This LoA is being issued in duplicate and you are requested to kindly acknowledge receipt and acceptance of this LoA by sending the duly stamped and signed duplicate copy of LoA to SECI within 07 days from date of this LoA.”

36. Based on their requisition, SECI has entered into PSAs with the buying utilities/ distribution licensees as under:

S. No.	Buying Utilities	Date of signing of PSA	PSA Capacity (MW)	Applicable Tariff to Buying Utility (Rs./kWh)
1.	Chhattisgarh State Power Distribution Company Limited (CSPDCL)	29.04.2022	300	As per Article 5.1.1 read with schedule 1 of the PSA: i. Rs.2.69/kWh (for 75 MW from ReNew Naveen Urja Private Limited) Plus Rs.0.07/kWh (Trading Margin); ii. Rs. 2.69/kWh (for 45 MW from Green Infra Wind Energy Limited) Plus Rs.0.07/kWh (Trading Margin); iii. Rs. 2.69/kWh (for 37.5 MW from Anupavan Renewables Pvt Ltd) Plus Rs.0.07/kWh (Trading Margin); iv. Rs. 2.70/kWh (for 112.5 MW from Adani Renewable Energy Holding Fifteen Limited) Plus Rs.0.07/kWh (Trading Margin); and v. Rs.2.70/kWh (for 30 MW from Azure Power India Pvt. Ltd) Plus Rs.0.07/kWh (Trading Margin).
2.	Madhya Pradesh Power Management Company Limited (MPPMCL)	15.06.2022	440	As per Article 5.1.1 read with schedule 1 of the PSA: i. Rs.2.69/kWh (for 110 MW from ReNew Naveen Urja Private Limited) Plus Rs.0.07/kWh (Trading Margin); ii. Rs. 2.69/kWh (for 66 MW from Green Infra Wind Energy Limited)

				<p>Plus Rs.0.07/kWh (Trading Margin);</p> <p>iii. Rs. 2.69/kWh (for 55 MW from Anupavan Renewables Pvt Ltd) Plus Rs.0.07/kWh (Trading Margin);</p> <p>iv. Rs. 2.70/kWh (for 165 MW from Adani Renewable Energy Holding Fifteen Limited) Plus Rs.0.07/kWh (Trading Margin); and</p> <p>v. Rs.2.70/kWh (for 44 MW from Azure Power India Pvt. Ltd) Plus Rs.0.07/kWh (Trading Margin).</p>
3.	Uttar Pradesh Power Corporation Limited (UPPCL)	28.06.2022	450	<p>As per Article 5.1.1 read with schedule 1 of the PSA:</p> <p>i. Rs.2.69/kWh (for 112.5 MW from ReNew Naveen Urja Private Limited) Plus Rs.0.07/kWh (Trading Margin);</p> <p>ii. Rs. 2.69/kWh (for 67.5 MW from Green Infra Wind Energy Limited) Plus Rs.0.07/kWh (Trading Margin);</p> <p>iii. Rs. 2.69/kWh (for 56.25 MW from Anupavan Renewables Pvt Ltd) Plus Rs.0.07/kWh (Trading Margin);</p> <p>iv. Rs. 2.70/kWh (for 168.75 MW from Adani Renewable Energy Holding Fifteen Limited) Plus Rs.0.07/kWh (Trading Margin); and</p> <p>v. Rs.2.70/kWh (for 45 MW from Azure Power India Pvt. Ltd) Plus Rs.0.07/kWh (Trading Margin).</p>
4.	GRIDCO Limited	7.11.2022	10	As per Article 5.1.1 read with schedule 1 of the PSA:
Total			1200 MW	

37. As per the Wind Guidelines, the Evaluation Committee is required to certify that the bidding process and the evaluation have been conducted in conformity with the provisions of the RfS. SECI has submitted a Conformity Certificate certifying that after the conclusion of the submission of the bid, the BEC constituted for the bid evaluation, has conducted the techno-commercial as well as financial bid evaluation

in conformity with the provisions of the RfS. The Conformity Certificate also certifies that the applicable Guidelines and amendments /clarification thereof, if any, issued by the Government of India, were followed for the bidding process and no deviation was taken from the Guidelines in the RfS documents. The relevant extract of the aforesaid Conformity Certificate dated 30.6.2022 reads as under:

“Conformity Certificate

With respect to the RfS no. SECI/ C&P/WPD/1200MW/T11/RfS/052021 dated 25.05.2021, it is hereby declared as follows:

1. *After the conclusion of bid submission, the Evaluation Committee constituted for evaluation of bids has conducted the techno-commercial as well as financial bid evaluation in conformity to the provisions of the RfS.*
2. *Applicable Guidelines and amendments/clarifications thereof, if any, issued by Government of India for the bidding process were followed in the above tender and no deviation was taken from the Guidelines in the RfS documents for the above tender.*

*(Pratik Prasun)
Manager (C&P)*

*(Ajit Sharma)
Dy. Manager (Fin.)*

*(Aditee Nitnavare)
Dy. Manager (PS)”*

38. However, the Commission sought clarification from the Petitioner, vide RoP for the hearing held on 7.2.2023, as to how the incorporation of the pre-determined Change in Law relief of Rs 0.0045/kWh for an increase/decrease of Rs 1 lakh per MW in the Project cost would not amount to a departure from the provisions of Clause 7.8.1 of the Wind Guidelines which provides that the ‘*quantum & mechanism*’ of the compensation payment due to Change in Law shall be determined by the Appropriate Commission and whether there has been any approval of the Appropriate Commission or any other Competent Authority for the incorporation of such clause.

39. In response to the query of the Commission, SECI, vide letter dated 15.3.2023, requested the MNRE to approve the modifications in the Change in Law

provisions in the Wind (Tranche-XI) tender in line with the approval accorded vide MNRE's letter dated 1.3.2021. MNRE, vide its letter dated 19.9.2023 granted *ex post facto* approval for the modification in provision regarding the pre-determined compensation for Change in Law events incorporated in the ISTS Wind Tranche-XI tender. Relevant portions of the MNRE Letter dated 19.9.2023 are extracted as under:

“ This is with reference to SECI's letter No. SECI/C&P/Wind/MNRE/54521 dated 15.02.2023 requesting ex post facto approval from MNRE for allowing modification in Change-in-Law provisions, incorporated in SECI's 1200 MW Wind Tranche-XI tender (RfS No. SECI/C&P/WPD/1200MW/T11/RfS/052021 dated 25.05.2021).

2. In this regard, the undersigned is directed to convey the ex post facto approval for modification in provisions regarding 'pre-determined compensation for specified Change-in-Law events', incorporated in SECI's 1200 MW Wind Tranche-XI tender [RfS No. SECI/C&P/WPD/1200MW/T11/RfS/052021 dated 25.05.2021], subject to SECI very carefully ensuring that no additional benefit accrues to the successful bidders and there is no impact on the discovered tariff”.

3. The undersigned is directed to advise SECI that in future, it should strictly abide with procedural & legal requirements and Standard Bidding Guidelines issued by the Government, in letter and spirit and that in case any deviation(s) are required from Guidelines issued by the Central Government under Section 63 of the Electricity Act, SECI should take timely steps for getting requisite approval in respect of such deviation(s), well before the last date of bid submission for such bid(s).”

40. In this regard, the case presented by SECI, vide affidavit dated 3.10.2023, is summarised as under:

(a) SECI, vide its letter dated 26.11.2020 and email dated 13.1.2021, had requested MNRE to, *inter-alia*, ratify the modification of the Change in Law provision of the Standard Bidding Guidelines and, in the meantime, allow SECI to make changes with respect to certain provisions in the Scheme documents to accommodate the concerns of various stakeholders.

(b) MNRE vide Notification dated 1.3.2021 gave approval for the changes in respect of certain provisions vis a vis Standard Bidding Guidelines in respect

of (i) bids that have been issued but not closed, and (ii) bids that have been issued and closed by SECI.

(c) On 21.12.2020, SECI issued the tender (RfS) for the ISTS Wind (Tranche-X) Scheme. The bidding documents and the PPAs and PSAs signed in pursuance of the above scheme laid down the formula according to which pass through on account of the Change in Law shall be calculated. The pass through on account of the Change in Law was stipulated as a fixed value of Rs.0.0045/kWh for every net increase/decrease of Rs.1 lakh per MW in the Project cost. The above scheme was covered by the Notification dated 1.3.2021 of MNRE.

(d) For the subsequent tenders, it was expected that the Unified Standard Bidding Guidelines would be issued by the MNRE, which would cover SECI's request for the modification of the Change in Law provision. Subsequent to the ISTS Wind (Tranche-X) Scheme, SECI initiated the ISTS Wind (Tranche-XI) Scheme (relevant scheme for the present case). SECI has contended that pending the issuance of the Unified Bidding Guidelines (which would have covered the Change in Law aspects), the ISTS Wind Tranche-XI tender was drafted in line with the provisions approved for the Tranche-X tender to maintain the continuity between the two tranches. Accordingly, the Change in Law provision in the ISTS Wind (Tranche-XI) tender was incorporated in line with the provisions as approved by the Government of India (MNRE) vide letter dated 1.3.2021.

41. We have gone through the SECI letter dated 26.11.2020. The relevant extracts of the said letter dated 26.11.2020 are as under:

"This has reference to various bids being invited by SECI for procurement of power under different GOI Schemes more specifically Standard Bidding Guidelines, RTC Power Guidelines and Hybrid Guidelines. As a part of process SECI has been approaching/interacting with various Buying Entities/Discoms for the onward sale of power being procured from SPDs under different Schemes. Recently, it has been seen that many of the Discoms are apprehensive in regard to certain conditions of the Guidelines and therefore not willing to execute/conclude Power Sale Agreement with SECI. Following are the main contentious issues which has emanated from the Scheme Guidelines:

.....

In order to enable conclusion of PSA with different Discoms in as effective and efficient manner, it is requested to do away with or modify the above provisions which are causing hardships to the Discoms by way of making amendments/modifications/clarifications to the Scheme Guidelines. Accordingly, relevant modifications/amendment for kind consideration is enclosed as Annexure-A.

Currently, following tenders issued by SECI are under Bidding Stage:

- *5000 MW Power on “Round-the-Clock” basis, from RE Power Projects, complemented with Thermal Power (RTC-II)*
- *1200 MW ISTS- Connected Wind-Solar Hybrid Power Projects (Tranche-III)*

In these two tenders, the RfS contains the provisions discussed above. Since, the proposed amendment may take time, for successful conclusion of tenders and sale of contracted power, SECI may kindly be allowed to take necessary deviations/exceptions from the Guidelines to accommodate concern of Discoms, for above mentioned tenders, as well as tenders where LOAs have been issued, but difficulty is being faced in signing of PPAs/PSAs. This will enable SECI in concluding Power Sale Agreements with different Discoms in expeditious and effective manner.”

42. In response to SECI’s letter dated 26.11.2020 and subsequent email dated 13.1.2021, the MNRE, vide letter dated 1.3.2021, granted approval to SECI for bids that have been issued but not closed and for bids that have been issued and closed, as under:

“This is in reference to the SECI’s letter No. SECI/SD/Misc./40098 dated 26.11.2020 (copy enclosed) and subsequent email dated 13.1.2021 (copy enclosed) on the subject issue.

2. *In this regard, the undersigned is directed to inform SECI that:*

i. Some of the cited issues have already been addressed in the recent “Guidelines for Tariff Based Competitive Bidding Process for procurement of power from Grid Connected Wind Solar Hybrid Projects” issued by MNRE.

ii. Further, for future projects, it is expected that the Unified Standard Bidding Guidelines for Tariff based Competitive Bidding Process for Procurement of Power from Grid-Connected Renewable Power Projects, to be issued by MNRE, will resolve such issues.

iii Meanwhile, SECI is allowed to make changes/deviations, as per SECI’s proposal in aforesaid letter/email, on the points mentioned below, both in bids that have been issued but not closed and in bids that have been issued and closed. However, where the bids have been

closed, SECI should be very carefully ensure that no additional benefit accrues to the successful bidder and there is no impact on the discovered tariff;

- a. Termination compensation on Account of Non-Natural Force Majeure Conditions;*
- b. Option of taking over of the Project assets by the Buying Entities in case of SPD's Event of Default.*
- c. Change in Law provisions*
- d. Additional Risk Premium of Rs.0.10/kWh.*

3. This issues in line with the approval of Hon`ble Minister (NRE & Power)..."

43. The aforesaid approval granted by the MNRE needs to be considered in the context of the specific approval sought by SECI in the letter. The MNRE approval cannot be extended to any other tender issued subsequently by SECI since MNRE has categorically dealt with future projects in its letter dated 1.3.2021, stating that *"it is expected that the Unified Standard Bidding Guidelines for Tariff based Competitive Bidding Process for Procurement of Power from Grid-Connected Renewable Power Projects, to be issued by MNRE, will resolve such issues."*

44. In the bid under consideration in the present Petition, SECI issued the Request for Selection document only on 25.5.2021, i.e. after the MNRE letter dated 1.3.2021. Admittedly, SECI had initiated the bid under consideration, i.e. ISTS Wind (Tranche-XI) Scheme with a deviation from the Guidelines/bid documents, expecting that the Unified Standard Bidding Guidelines would be issued by the MNRE, which will cover SECI's request for the modification of the Change in Law provision.

45. It is also noted that MNRE's approval was issued only on a *post facto* basis vide letter dated 19.9.2023 and RfS documents were issued incorporating such modified Change in Law provision without approval for such a deviation. In fact, the

Petitioner approached MNRE only in response to the query raised by the Commission during the hearing held on 7.2.2023.

46. Since SECI could have approached MNRE for *ex-post facto* approval before signing the conformity certificate and filing the Petition for Tranche XI, we consider it an instance of deliberately ignoring i of the Commission's advice given in various earlier orders and non-compliance of the MNRE guidelines. Instead, SECI chose to sign and submit a misleading conformity certificate in the present Petition, deliberately ignoring the advice of the Commission in previous orders.

47. In light of the continuous non-compliance by SECI in various bids the MNRE, vide its *ex-post facto* approval dated 19.9.2023 advised SECI, *inter-alia*, to strictly abide by the procedural & legal requirements and the Standard Bidding Guidelines issued by the Government. The relevant portion of the MNRE letter is as follows:

"3. The undersigned is directed to advise *SECI that in future, it should strictly abide with procedural & legal requirements and Standard Bidding Guidelines issued by the Government, in letter and spirit and that in case any deviation(s) are required from Guidelines issued by the Central Government under Section 63 of the Electricity Act, SECI should take timely steps for getting requisite approval in respect of such deviation(s), well before the last date of bid submission for such bid(s).*"

48. We reiterate that we are concerned with the casual approach with which the Petitioner has been stating that no deviations are taken from the provisions of the Guidelines in its conformity certificate in various bids conducted by it.

49. Further, Azure Power India Private Limited (Respondent No 4) and Two Wind Pvt Ltd. (Respondent No. 6) vide their common written submissions dated 6.11.2023 have alleged that SECI had introduced a cut-off date in Article 12.1.2 of the PPA in order to restrict the compensation for the Change in Law only till the actual commissioning date of the last part capacity or the Scheduled Commissioning Date

(SCD) or the extended SCD, whichever is earlier. As per Respondents, the effect of the said deviation is that it restricts the WPDs/generators (such as APIPL/TWEPL) to claim relief pertaining to Change in Law only during the construction phase and not during the operation phase. The Respondents, generators have further contended that the APTEL and other SERCs including this Commission have time and again allowed the generators to claim Change in Law relief during the operation period i.e., period beyond the actual commissioning date. Similar submissions have been made by the other generators.

50. SECI has rejected the above contention of the generators, stating that it was made abundantly clear to the participating bidders in a pre-bid conference that the PPA clause will not be modified and the bidders will have to submit their bids only in terms of the draft PPA which provided for Article 12.1.2 dealing with the impact of Change in Law compensation with regard to the project cost. As per SECI, it had specifically restricted the consideration of the project cost in Article 12.1.2.

51. Clause 7.8 of Guidelines and Article 12.1.2 of the PPA are extracted as under

Clause 7.8 of the Guidelines

“7.8. CHANGE IN LAW

7.8.1. In the event a Change in Law results in any adverse financial loss/gain to the WPG then, in order to ensure that the WPG is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the WPG/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.

7.8.2. In these Guidelines, the term Change in Law shall refer to the occurrence of any of the following events after the last date of the bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the

prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the WPG; or (v) any change in the rates of any Taxes which have a direct effect on the Project. However, Change in Law shall not include any change in (a) taxes on corporate income or any change in any withholding tax on income or dividends; and (b) Custom duty on imported equipment.”

Article 12.1.2 of the PPA

“ARTICLE 12: CHANGE IN LAW

12.1 Definitions

In this Article 12, the following terms shall have the following meanings:

12.1.1 *In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after 06.07.2021 including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Wind Power Developer; or (v) any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the wind power project and supply of power from the Project by the WPD which have a direct effect on the Project.*

.....

12.1.2 *In the event of occurrence of any of events as provided under Article 12.1.1 which results in any increase/ decrease in the Project Cost (i.e. **cost incurred by the SPD towards supply and services only for the Project concerned, upto the Actual Commissioning Date of the last part capacity or Scheduled Commissioning Date or extended Scheduled Commissioning Date, whichever is earlier, for reasons other than those wherein such extension is on account of payment of liquidated damages, penalty or any other charges, as the case may be**), the WPD/ SECI / Buying Utility(ies) shall be entitled for compensation by the other party, as the case may be, subject to the condition that the such ‘Change in Law’ is recognized by the Appropriate Commission. Compensation payment on account of such ‘Change in Law’ shall be determined and shall be effective from such date as may be decided by the Appropriate Commission. For eg., in case the Actual Commissioning Date of the last part capacity is 15.04.2022, Scheduled Commissioning Date is 15.03.2022 and extended Scheduled Commissioning Date is 01.04.2022, the Project Cost shall be determined as the cost incurred by the WPD upto 01.04.2022.*

12.2 Relief for Change in Law

12.2.1 *Save and except as provided under Article 12.1.3, the aggrieved Party shall be required to approach the Appropriate Commission for seeking approval of Change in Law.*

12.2.2 *The decision of the Appropriate Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be applicable and governing on WPD and Buying Entity.*

12.2.3 *In case of Change in Law as approved by the Appropriate Commission pursuant to Article 12.2.1 or as provided under Article 12.1.3, the WPD/ SECI/ Buying Entities (as the case may be) shall be entitled for relief as follows:*

Every net increase/decrease of Rs.1 lakh per MW in the Project Cost shall be liable for corresponding increase/decrease of an amount equal to Rs 0.0045 /kWh in the monthly tariff payable.

*Any such change shall be considered upto three **digits** after the decimal point, and remaining digits, if any, shall be ignored.*

For e.g. in case the change in tariff payable is calculated as Rs. 0.14678/kWh, it shall be modified as Rs. 0.146/kWh.”

52. It is apparent from Clause 7.8.1 of the Guidelines that there is no restriction in terms of the cut-off date for claiming the Change in Law towards an increase/decrease in project cost. Admittedly, SECI had consciously restricted the Change in Law relief with regard to the increase/decrease in project cost with reference to the SCOD, actual COD and extended SCOD. Consequently, any additional expenditure incurred by the WPDs on account of the Change in Law event occurring after the commissioning of the project cannot be claimed under the provisions of Change in Law. Therefore, such an incorporation in the PPA is outside the scope of Clause 7.8 of the Guidelines.

53. From the MNRE letter dated 19.9.2023, it is evident that the Petitioner has not taken approval for the said deviation from the Guidelines. While the previous approval dated 1.3.2021 was generic in nature, the approval granted by MNRE on 19.9.2023 was limited to the incorporation of ‘pre-determined compensation for specified Change in Law’. However, we observe that the modified Change in Law provisions appear to have been already incorporated in the bid documents at the

time of issuance of the same. Thus, the bidder(s) participating in the bid were made aware of the said provisions. The Commission would again like to advise SECI that it must invariably always comply with the procedural and legal requirements in letter and spirit.

54. The Respondent WPDs have also indicated that the final draft of the PPA shared by SECI on 8.7.2022 with WPDs included various material changes which were not part of the standard PPA included in the RfS based on which the bid was conducted. The WPDs have alleged that the Petitioner unilaterally amended the terms of the PPA post bid without even consulting the WPDs or by way of approaching the Commission. The WPDs have placed on record their communications to SECI opposing the changes/amendments made in the final draft of the PPA after the conclusion of the bid process.

55. *Per Contra*, SECI has contended that the proposed changes in the draft PPA were discussed at length in a meeting held on 4.8.2022 with WPDs. During the meeting, SECI pointed out that the draft PPA shared vide email dated 8.7.2022 only has few minor changes on the specific request of the Buying Entities/ distribution companies without changing any material obligations by the concerned parties. Further, SECI vide its letter dated 22.8.2022 issued the clarification with regard to the changes made in the draft PPA and post that all selected bidders except Adani Renewable Energy Holdings Fifteen Limited signed their respective PPAs. Thereafter, after various communications between SECI and Adani, Adani Renewable Energy Holdings Fifteen Limited signed the PPA on 30.12.2022.

56. It is noted that the amended PPAs circulated on 8.7.2022 were signed by all the WPDs by 30.12.2022. The Petitioner approached MNRE for ex-post facto

approval much later, in response to a query raised by the Commission during the hearing held on 7.2.2023. We are of the view that the Petitioner ought to have taken approval of the amendments made in the PPA and the Change in Law clause of the PPA with regard to the cut-off date when it approached the MNRE for ex-post facto approval. The Commission would expect the Petitioner to refrain from adopting such a careless and casual approach in the future and to seek prior approval of any deviation being made in the bid documents.

57. In view of the aforesaid discussions, it emerges that the selection of the successful bidders has been done, and the tariff of the wind power projects has been discovered by the Petitioner, SECI, through a transparent process of competitive bidding in accordance with Guidelines (read with ex post facto approval vide letter dated 1.3.2021 of MNRE) issued by the Ministry of Power, Government of India under Section 63 of the Act. Further, the Petitioners have also consciously and voluntarily signed the respective PPAs. Therefore, in terms of Section 63 of the Act, the Commission adopts the individual tariff for the solar power project, as agreed to by the successful bidder(s), and for which PPA has been entered into by SECI on the basis of the PSAs with the distribution licensees, which shall remain valid throughout the period covered in the PPA and PSAs.

58. Prayer (a) of the Petitioner is answered accordingly.

59. Article 10.3 of the PPA provides as under:

“Payment of Monthly Bills

10.3.1 SECI shall pay the amount payable under the Monthly Bill/Supplementary Bill by the Due Date to such account of the WPD, as shall have been previously notified by the WPD as below.

10.3.2 All payments required to be made under this Agreement shall also include any deduction or set off for:

- i) deductions required by the Law; and*

- ii) amount claimed by SECI, if any, from the WPD, will be adjusted from the monthly energy payment. In case of any excess payment adjustment, 1.25% surcharge will be applicable on day to day basis.

The WPD shall open a bank account (the "WPD's Designated Account") for all Tariff Payments (including Supplementary Bills) to be made by SECI to the WPD, and notify SECI of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. SECI shall also designate a bank account at New Delhi ("SECI Designated Account") for payments to be made by the WPD to SECI, if any, and notify the WPD of the details of such account ninety (90) Days before the Scheduled Commissioning Date. SECI and the WPD shall instruct their respective bankers to make all payments under this Agreement to the WPD's Designated Account or SECI's Designated Account, as the case may be, and shall notify either Party of such instructions on the same day."

60. Further, Article 10.4 of the PPA provides as under:

"Payment Security Mechanism

Letter of Credit (LC):

10.4.1 SECI shall provide to the WPD, in respect of payment of its Monthly Bills and/or Supplementary Bills, a monthly unconditional, revolving and irrevocable letter of credit ("Letter of Credit"), opened and maintained which may be drawn upon by the WPD in accordance with this Article.

10.4.2 Before the start of supply, SECI through a scheduled bank open a Letter of Credit in favour of the WPD, to be made operative from a date prior to the Due Date of its first Monthly Bill under this Agreement. The Letter of Credit shall have a term of twelve (12) Months and shall be renewed annually, for an amount equal to:

- i) for the first Contract Year, equal to the estimated average monthly billing;*
- ii) for each subsequent Contract Year, equal to the average of the monthly billing of the previous Contract Year.*

10.4.3 Provided that the WPD shall not draw upon such Letter of Credit prior to 30 days beyond the Due Date of the relevant Monthly Bill and/or Supplementary Bill, and shall not make more than one drawal in a Month.

10.4.4 Provided further that if at any time, such Letter of Credit amount falls short of the amount specified in Article 10.4.2 due to any reason whatsoever, SECI shall restore such shortfall before next drawl.

10.4.5 SECI shall cause the scheduled bank issuing the Letter of Credit to intimate the WPD, in writing regarding establishing of such irrevocable Letter of Credit.

10.4.6 SECI shall ensure that the Letter of Credit shall be renewed not later than its expiry.

10.4.7 All costs relating to opening, maintenance of the Letter of Credit shall be borne by SECI.

10.4.8 If SECI fails to pay undisputed Monthly Bill or Supplementary Bill or a part thereof within and including the Due Date, then, subject to Article 10.4.6 & 10.5.2, the WPD may draw upon the Letter of Credit, and accordingly the bank shall pay, an amount equal to such Monthly Bill or Supplementary Bill or part thereof, in accordance with Article 10.4.3 above, by presenting to the scheduled bank issuing the Letter of Credit, the following documents:

- i) a copy of the Monthly Bill or Supplementary Bill (only for energy related bills) which has remained unpaid to WPD and;
- ii) a certificate from the WPD to the effect that the bill at item (i) above, or specified part thereof, is in accordance with the Agreement and has remained unpaid beyond the Due Date;”

61. Regulation 9(10) of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020 (hereinafter referred to as the “Trading Licence Regulations”) provides as under:

“The Trading Licensee shall make payment of dues by the agreed due date to the seller for purchase of the agreed quantum of electricity through an escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller. Such escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller shall be equivalent to:

(a) one point one (1.1) times the average monthly bill amount (estimated average of monthly billing amounts for three months or actual monthly billing amount for preceding three months as the case may be) with a validity of one year for long term contracts;

(b) one point zero five (1.05) times of contract value for short term contracts.”

62. The above provisions provide for payment security mechanisms, and the same is required to be complied with by the parties to the present Petition. Accordingly, the provisions of Articles 10.3 and 10.4 of the PPAs and Clause 10 of Regulation 9 of the Trading Licence Regulations shall be abided by all the concerned parties to the present Petition.

63. The Petitioner has also prayed to approve the trading margin of Rs. 0.07/kWh as agreed to by the Distribution Licensees in terms of the PSAs with the Distribution Licensees. In this regard, Regulation 8(1)(d) of the Trading Licence Regulations dealing with trading margin provides as under:

“For transactions under long term contracts, the trading margin shall be as mutually decided between the Trading licensee and the seller:...”

64. The above provision gives the choice to the contracting parties to mutually agree on trading margin for long-term transactions.

65. However, proviso to Regulation 8(1)(d) of the Trading Licence Regulations provides as under:

*“8(1)(d) ******

Provided that in contracts where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh.”

66. Regulation 8(1)(f) of the Trading Licence Regulations provides as under:

“For transactions under Back to Back contracts, where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh.”

67. The above two provisions are exceptions to the main provision as regards trading margin. Distribution licensees have agreed to a trading margin of Rs. 0.07/kWh as agreed in the PSA, which is in consonance with Regulation 8(1)(d) of the Trading Licence Regulations. Therefore, in case of failure by SECI to provide an escrow arrangement or irrevocable, unconditional, and revolving letter of credit to the wind generators, the trading margin shall be limited to Rs. 0.02/kWh as specified in Regulation 8(1) (d) and Regulation 8(1)(f) of the Trading Licence Regulations.

68. Prayer (b) of the Petitioner is answered accordingly.

69. Additionally, the Petitioner has also prayed to recognize in terms of Article 12.1.3 of the PPAs and Article 8.1.3 of the PSAs that the change in rates of Safeguard Duty, GST and Basic Customs Duty after 6.7.2021, if any, will be considered as Change in Law subject to the fulfilment of the conditions contained therein, and the quantum of compensation payment on account of the change in rates of such duties shall be provided to the affected party by the other party as per Article 12.2.3. The Article 12.1.3 of the PPAs and Article 8.1.3 of the PSAs read as under

PPAs:

“ARTICLE 12: CHANGE IN LAW

However, in case of change in rates of safeguard duty, GST and basic customs duty after 6.7.2021 and resulting in change in Project Cost, then such change will be treated as ‘Change in Law’ and the quantum of compensation payment on account of change in rates of such duties and shall be provided to the affected party by the other party as per Article 12.2.3, subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff by the Appropriate Commission and any decision in this regard shall be governing on WPD and Buying Entity.

12.2 Relief for Change in Law

12.2.3 In case of Change in Law as approved by the Appropriate Commission pursuant to Article 12.2.1 or as provided under Article 12.1.3, the WPD/ SECI/ Buying Entities (as the case may be) shall be entitled for relief as follows:

Every net increase/decrease of Rs.1 lakh per MW in the Project Cost shall be liable for corresponding increase/decrease of an amount equal to Rs 0.0045 /kWh in the monthly tariff payable.

Any such change, shall be considered up to three digits after the decimal point, and remaining digits, if any, shall be ignored.

For e.g. in case the change in tariff payable is calculated as Rs. 0.14678/kWh, it shall be modified as Rs. 0.146/kWh.

PSAs:

ARTICLE 8: CHANGE IN LAW

.....

8.1.3 However, in case of change in rates of safeguard duty, GST and basic customs duty after 6.7.2021 and resulting in change in Project Cost, then such change will be treated as 'Change in Law' and the quantum of compensation payment on account of change in rates of such duties and shall be provided to the affected party by the other party as per Article 8.2.3, subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff by the Appropriate Commission and any decision in this regard shall be governing on WPD and Buying Entity.”

70. Perusal of the above Articles of the PPAs/PSAs reveal that the parties have agreed that in case of changes in rates of Safeguard Duty, GST and Basic Customs Duty after 6.7.2021 and resulting in a Change in project cost, such change will be treated as a 'Change in Law' and the quantum of compensation payment on account of the change in rates of such duties shall be provided to the affected party as per Article 12.2.3, subject to the provision that the Appropriate Commission recognizes such provisions at the time of adoption of tariff, and any decision in this regard shall be governing on the WPD and buying entity. Further, the PPAs and PSAs also provide for a pre-determined quantum of compensation for Change in Law events, whereby for every net increase/ decrease of Rs.1 lakh per MW in the Project cost, there shall be a corresponding increase/ decrease of an amount equal to Rs.0.0045/kWh.

71. On the basis of the above provisions of the PPA and relying upon the order of APTEL in the Green Infra Case, the Respondents/Wind Power Developers have also sought recognition of the Change in Law events that occurred after 6.7.2021, namely, the Ministry of Finance's Notification dated 30.9.2021, by which the applicable Goods & Services Tax (GST) on the renewable energy devices and parts thereof has been notified @ 12% w.e.f. 1.10.2021.

72. We proceed to examine the aforesaid Change in Law claim of the parties at this stage of adoption of tariff itself especially in view of specific provision of PPAs

as well the order of the APTEL in Green Infra Case wherein the APTEL observed as under:

“16. During the hearing, we pointedly asked but no regulation or contractual clause or, for that matter, any other provision was shown as could reflect an inhibition or prohibition against consideration of claim of change in law compensation at the stage of adoption of the tariff discovered by the bid process under Section 63 of the Electricity Act, 2003. We agree with the appellant that deferring such claim for later date creates a whole lot of confusion and, what is of utmost concern to the project developers, regulatory uncertainty and consequent difficulties in attaining financial closure. It cannot be ignored that the impact on the cost of the development of the project of such change in law events that have occurred after the submission of the bid and closure of the bid process but before the adoption of the bid discovered price renders the bid price unrealistic and in terms of Section 86 (1) (b) of the Electricity Act, it is the duty of the State Commission to inquire into such claim at the first opportune time and bring in suitable corrections, may be first by declaration and followed up by detailed tariff orders. If the event referred to actually constitutes change in law within the four corners of its definition under the PPA, there is no reason why it cannot be duly recognized as a change in law at the stage of tariff adoption, the actual impact and extent of the relief admissible to be determined at the appropriate stage.”

73. The Respondents have sought the recognition of the increase in the applicable GST rates on the renewable energy devices and parts thereof from 5 % to 12% by virtue of Notification No. 8 of 2021- Integrated Tax (Rate) & Notification No.8 of 2021- Central Tax (Rate) dated 30.9.2021 (collectively, ‘GST Notifications’) issued by Ministry of Finance, Government of India. It has been submitted that as on the date of submission of the bid, the applicable rate of GST on the renewable energy devices and parts thereof was 5% in terms of the Notification No.1 of 2017- Integrated Tax dated 28.6.2017 and subsequently, vide Notification No. 8 of 2021 dated 30.9.2021, Ministry of Finance, Government of India amended the earlier Notification No.1 of 2017-Integrated Tax and thereby increased the applicable GST rate to 12% from earlier 5%. The Respondents have submitted that at Article 12.1.3 of the PPAs, the parties have also agreed that a change in rates of GST after 6.7.2021 resulting in a change in project cost will be treated as a Change in Law provided the Commission recognises it as a Change in Law event and thus, the Commission may recognize the increase in the applicable rate of GST on the

renewable energy devices and parts thereof by virtue of GST Notifications issued by the Ministry of Finance, Government of India as Change in Law event at the stage of adoption of tariff itself. SECI, in its response, has again not opposed the recognition of the above increase in the applicable rate of GST on the renewable energy devices and parts thereof in terms of the Notifications of the Ministry of Finance as Change in Law event and has further submitted that the Commission may pass an appropriate order as prayed for by SECI recognizing the same as Change in Law event within the scope of Article 12 of the PPAs and the actual impact may be considered at the appropriate stage.

74. We have considered the submissions made by the parties. The increase in the applicable rate of GST on the renewable energy devices and parts thereof from 5% to 12% has been as a result of the Notification No. 8/2021-Intergrated Tax dated 30.9.2021 issued by the Department of Revenue, Ministry of Finance, Government of India – Indian Government Instrumentality as defined in the PPAs – and the parties, at Article 12.1.3 of the PPAs, have also agreed that change in the rates of GST after the 6.7.2021 resulting into the change in the project cost will be treated as Change in Law event and accordingly, the Commission recognizes the said increase in the rate of GST on the renewable energy devices and parts thereof in terms of the Notification of the Ministry of Finance, Government of India, post 6.7.2021, as Change in Law event. The Wind Power Developers shall be entitled to the applicable reliefs on account of the Change in Law event as per the provisions of the PPAs after they have incurred the additional expenditure on account of the aforesaid Change in Law event.

75. Respondents 1 & 3 have also requested that the Commission take into account the delay in the adoption of tariffs and hold that Respondents are entitled to

corresponding extensions of timelines to achieve the financial closure and scheduled commissioning date in terms of Article 2.1.3 read with Article 2.1.4 of the PPAs.

76. We have considered the said submissions of the Respondents. Articles 2.1.3 and 2.1.4. provides as under:

“2.1.3 Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either party against the other under this Agreement shall be that, within 120 days after the Effective Date of the PPA, SECI shall obtain adoption of tariff from CERC and the Buying Entity(ies) shall obtain necessary approval/consent for procurement of the power under PSA from its State Electricity Regulatory Commission, on the terms and conditions contained in this Agreement read with the terms and conditions contained in the Power Sale Agreement entered into between SECI and the Buying Entity(ies). The Parties agree that in the event, the order of adoption of tariff or procurement of power as mentioned above is not issued by the SERC and/or CERC (as applicable) within the time specified above, the provisions of Article 2.1.4 shall apply.

2.1.4 Pursuant to Article 4.2.6, if parties have not mutually extended the time period as stipulated under Article 2.1.3 and the order from the SERC and/or CERC (as applicable) is issued within the timeline as per Article 2.1.3, no extension for Financial Closure or Scheduled Commissioning Date shall be given. However, if the requisite SERC and/or CERC (as applicable) order is issued after the timeline as per Article 2.1.3, this shall entail a corresponding extension in Scheduled Financial Closure and the Scheduled Commissioning Date for equal number of days for which the SERC and / or CERC order has been delayed beyond such period as specified in Article 2.1.3. Provided further that in case, the order of adoption of Tariff and/or procurement approval from CERC and/or SERC as required under Article 2.1.3 above is not received or delayed, either Party shall not be liable for payment of any compensation to other Party for any loss or damage on account of such delay in availability or non-availability of the approval of CERC/SERC, as the case may be.”

77. We observe that Article 2.1.3, read with Article 2.1.4 of the PPAs quoted above, in line with the provisions of the Guidelines, already provide for the extension of the scheduled financial closure and scheduled commissioning date for an equal number of days for which the order for the adoption of tariff by the Appropriate Commission has been delayed beyond 120 days. Hence, we do not find any need to issue a separate direction on the subject matter as the contractual provisions already deal with this and provide the course of action in such event(s).

78. Prayer (c) of the Petitioner is answered accordingly.

79. Furthermore, the Respondents have also raised objections regarding non-fulfilment of the statutory obligations, execution of the PPA beyond bid validity, the tariff proposed under the PPA becoming unviable on account of the inordinate delay caused by the Petitioner to execute the PPA, etc. Respondent No. 3, GIWEL, has requested to declare the Ministry of Finance Notification dated 30.9.2021 as Change in Law under Articles 12.1.1(v) and 12.1.3 of the PPA and approve the dispensation provided under Articles 12.1. 3 and 12.2.3 of the PPA.

80. *Per contra*, SECI has submitted that the Respondents are not entitled to raise extraneous and other aspects excluding anything which directly relate to the prayers made which is based on the competitive bidding held and culminated with the selection the bidders and the due execution of the contractual documents, namely PPA and PSA. The Respondents have raised unwarranted and baseless allegation which are not relevant for the adoption of tariff provided in the Guidelines under Section 63 of the Act. The scope of the present proceedings is limited, the objections raised by Respondents are not to be considered in the present proceedings. If the Respondents have any bona-fide grievance about the implementation of the PPAs duly executed by them, they are at liberty to raise them through an independent proceedings after the adoption of the tariff. The present proceedings for the adoption of tariffs at the culmination of the competitive bidding process envisaged in the Guidelines cannot be a platform to agitate issues on the terms of the duly executed PPAs or as an opportunity to claim unilateral termination of the duly executed PPAs.

81. We have considered the submissions of the Petitioner and Respondents. The present Petition has been filed by SECI, praying for the adoption of tariffs discovered

in the tariff-based competitive bid process of Wind power projects and approval of trading margins. In the above paragraphs, we have already decided that the tariff has been discovered as per the provisions of the bidding guidelines in a transparent manner. As regards objections raised by the Respondents on the delay in signing the PPA and the unviability of the tariff, the Respondents are at liberty to approach the Commission for adjudication of these issues through separate Petitions. It is pertinent to mention that Respondent No. 5 has already filed Petition No. 348/MP/2023 in this regard, which shall be dealt with in accordance with law.

82. Petition No. 353/AT/2022 is disposed of in terms of the above.

Sd/-
(P.K.Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(Jishnu Barua)
Chairperson