

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Dr.T.Prabhakara Rao

.... Member

and

Thiru.K.Venkatasamy

.... Member (Legal)

I.A.Nos. 3 &5 of 2019

in

D.R.P. No.5 of 2019

and

D.R.P. No.5 of 2019

ReGenPowertech Private Limited
CIN: U40109TN2006PTC085606
Having its Registered Office at
Sivanandam, 1st Floor, New No.1
Pulla Avenue, Shenoy Nagar
Chennai, Tamil Nadu – 600 030
Represented by its authorized signatory
Mr.Narayanan Subramanian

... Petitioner

(Thiru N.L. Rajah, Senior Advocate
forThiru.Aravindan, Advocate representing
M/s.FoxMandal Associates)

Vs

1. Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO)
Represented by its Chairman and Managing Director
144, Anna Salai
Chennai – 600 002

2. The Director / Generation
Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)
No.144, Anna Salai
Chennai – 600 002.

3. The Chief Engineer
Non-Conventional Energy Sources (NCES)
Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO)
No.144, Anna Salai
Chennai – 600 002.
4. The Superintending Engineer
Non-Conventional Energy Sources (NCES)
Tamil Nadu Generation and Distribution
Corporation Limited (TANGEDCO)
Anna Building
Thiyagaraja Nagar
Tirunelveli – 627 011.

(Thiru S.R. Rajagopal, Additional
Advocate General for
Thiru.M.Gopinathan
Standing Counsel for TANGEDCO)

Dates of hearing : 09-08-2019; 27-08-2019; 05-09-2019;
17-09-2019; 24-09-2019; 15-10-2019;
22-10-2019; 10-12-2019; 28-01-2020;
25-02-2020; 14-07-2020; 21-07-2020;
28-07-2020; 18-08-2020; 01-09-2020;
02-09-2020; 25-09-2020 and 29-09-2020

Date of order : 27-10-2020

The D.R.P.No.5 of 2019 came up for final hearing before the Commission on 29-09-2020 and the Commission upon perusing the petition and connected records and after hearing the submissions of both sides passes the following:-

ORDER

1. Prayer in D.R.P.No.5 of 2019:-

The prayer of the petitioner in this D.R.P.No.5of 2019 is to direct the 1stRespondent to complete the evacuation facility / infrastructure as undertaken by them under the provisions of the Energy Purchase Agreement dated 19-10-2017 and /or Request for submission document bearing reference No.CE/NCES/O.T.

No.2/2017-18 and / or in its response to the pre-bid queries raised by the prospective bidders; and to consequentially extend the commissioning date of the project for the period of delay caused by the 1st Respondent until completion of the same in providing evacuation facility to the petitioner and pass such other and further orders, as this Commission deems fit and proper in the facts and circumstances of the case.

2. Prayer in the I.A.No.3 of 2019 in D.R.P. No.5 of 2019:-

The prayer of the petitioner in the I.A.No.3 of 2019 in D.R.P. No.5 of 2019 is to grant an order of interim-injunction restraining the 1st Respondent, its men, agents or affiliates from invoking and / or encashing the Performance Bank Guarantee dated 17-10-2017 (Bank Guarantee No.010971117000029) for an amount of INR 20,00,00,000/- (Indian Rupees Twenty Crores only) issued on behalf of the petitioner to the 1st Respondent and / or from levying any liquidated damages under clause 16 (b) of the Energy Purchase Agreement dated 19-10-2017 executed between the petitioner and the 1st Respondent pending disposal of the main petition.

3. Prayer in I.A. No.3 of 2019 in D.R.P. No.5 of 2019:-

The prayer of the petitioner in I.A. No.3 of 2019 in D.R.P. No. 5 of 2019 is to direct the Registry to appropriately calculate the court fee applicable to this dispute, in accordance with the Tamil Nadu Electricity Regulatory Commission, Chennai Fees and Fines (Amendment) Regulations, 2011 and refund the excess court fee of Rs.20,00,000/- (Rupees Twenty Lakhs only) collected from the petitioner.

4. Facts of the Case:-

This petition has been filed for seeking extension of time for date of commissioning of the project on account of reasons beyond the control of the petitioner primarily attributable to the 1st Respondents' inability to provide / complete the evacuation facility / infrastructure to the petitioner as undertaken by the 1st Respondent under the terms of the EPA and Rfs.

5. Contentions of the Petitioner:-

3.1. The first respondent invited bids to establish, maintain and operate wind power plants of 500 MW in the State of Tamil Nadu at the rate to be finalized through reverse bidding, considering the fixed tariff ceiling of Rs.3.46 (Rupees Three and Paise Forty Six only) per unit as the upper limit.

3.2. The petitioner was the lowest bidder and other bidders were asked to match the price offered by this petitioner, thereby ensuring success of the bid for the entire 500 MW capacity approved by this Commission.

3.3. The 1st Respondent selected the petitioner as one of the successful bidders. The 1st Respondent agreed to purchase the power generated at the rate of INR 3.42 (Indian Rupees Three and Paise Forty Two) per unit and issued a Letter of Intent to the Petitioner vide Lr. No.CE/NCES/SE/SOLAR/EE/WPP/AEE2 /F.M/s.ReGenGenPowertechPvt. Ltd. D.2067/17 dated 21.09.2017 ("Lol") on the terms and conditions specified under the RfS. Even though 1st Respondent had invited bids for 500 MW, the Petitioner was conscious of its ability and capability to undertake the project and applied for 200 MW only, which it was granted.

3.4. The petitioner entered into an Energy Purchase Agreement / Power Purchase Agreement on 19.10.2017 with the 1st Respondent ("EPA" / "PPA") for establishment of the 200 MW wind power project ("Project") at Therkumayilodai Village, Ottapidaram Taluk, Tuticorin District. An Addendum to the EPA dated 20.03.2018 ("Addendum to EPA") was executed to split the EPA into 4 projects of 50 MW each in the name of 4 subsidiaries wholly owned by the petitioner incorporated specially for the purposes of this project (special purpose vehicles). The addendum to EPA also recorded that M/s. Purushotama Perumal Renewable Energy Pvt. Ltd. ("PPRE") would undertake the commissioning of the first 50 MW on submission of a performance bank guarantee for INR 5,00,00,000 (Indian Rupees Five Crores only). Therefore, the EPA was amended to reflect that the petitioner would undertake the remaining 150 MW by itself or through its other three wholly owned subsidiaries.

3.5. A separate Energy Purchase Agreement between PPRE and the 1st Respondent was signed on 20-03-2018 recording the terms and conditions to develop and commission 50 MW ("PPRE EPA")

3.6. The Petitioner also submitted a Performance Bank Guarantee dated 17.10.2017 (No. 010971117000029) for an amount of INR 20,00,00,000 (Indian Rupees Twenty Crores only) ("PBG") at the rate of INR 10,00,000 (Indian Rupees Ten Lakhs only) per MW as per Clause 14 of the RfS. The PBG was

submitted as a security against commissioning of the Project within 15 months from the date of signing of the EPA i.e., 19.01.2019.

3.7. Clause 26(b) of the RfS stated that if the commissioning of the Project is delayed beyond 19.01.2019, the 1st Respondent may be entitled to encash the PBG on per day basis proportionate to the capacity not commissioned and in case the commissioning of the Project is delayed beyond 5 (five) months thereafter (19.06.2019), the 1st Respondent may be entitled to encash 100% (one hundred percent) of the PBG. In addition to such encashment, the Petitioner may also have to pay a sum of INR 10,000 per MW per day of delay as liquidated damages for the delay in such remaining capacity which is not commissioned.

3.8. Clause 26(b) further states that the maximum time period allowed for commissioning of the full Project capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be 10 (ten) months from the scheduled date of commissioning (19.11.2019). The amount of liquidated damages worked out as above may be recovered by the 1st Respondent from the payments due to the Petitioner on account of sale of the power generated by the Project to the 1st Respondent. In case, the commissioning of the Project is delayed beyond 10 months from the scheduled date of commissioning, the EPA capacity shall stand reduced / amended to the Project capacity commissioned and the EPA for the balance capacity will stand terminated. If the Project is not commissioned at all beyond 10 months from the scheduled date

of commissioning, the EPA will be terminated in entirety by the 1st Respondent.

3.9. In its letter dated 06.08.2018, the 1st Respondent communicated that the Petitioner must pay the tentative bay cost of INR 3,37,14,900/- (Indian Rupees Three Crores Thirty Seven Lakhs Fourteen Thousand Nine Hundred only) within 30 (thirty) days of receipt of the said communication for reserving 1 (one) 230 kV bay at Onamaakulam 230/33 kV Substation as part of the evacuation system. Accordingly, the Petitioner paid the bay cost on the same date (i.e. 06.08.2018) and was allotted a 230kV bay at the Substation owned by the 1st Respondent. However, the 1st Respondent did not carry out any of the works required for constructing the 230kV bay at the substation.

3.10. The 230/33 kV Substation allotted by the 1st Respondent was supposed to be interfaced with the newly established 400/230-110 kV Substation at Thennampatty. The newly established 400/230-110 kV Thennampatty Substation was required to be connected to the already commissioned, operational 400/230-110 kV Substation at Kayathar for evacuation of power. The 400 kV high voltage lines connecting the two substations was required to be installed and commissioned by TANTRANSCO by February, 2018 which is pending till date.

3.11. It is the duty of the 1st Respondent, both statutorily and contractually, to have ensure construction and development of the 400 kV HV lines to evacuate power. Due

to the non-operational state of the 400 kV side of the 400/230-110 kV Substation at Thennampatty and the non-completion of the 400kV line from Thennampatty to Kayathar which has been admitted by the 1st Respondent in its counter to the Writ Petitions, the Petitioner is unable to achieve financial closure for and consequently to Commission the entire 200 MW Project within the time agreed under the EPA even though the Petitioner has commissioned about 50 MW through PPRE. The Petitioner on its own violation began to develop the Project and planned evacuation of power from the existing 110 kV bay at the Onamakulam 230/33 kV Substation. The Petitioner, therefore, installed and commissioned five (5) kilometres of 110 kV lines between the Onamakulam Substation and the un-commissioned 400/230-110kV Substation at Thennampatty, since it was left without any measures to evacuate the power that its Project would generate.

3.12. The Petitioner installed and commissioned 2.89 kilometres of 230 kV DC line on DC Tower from the 400/230-110 kV Substation at Thennampatty connecting to the existing 230 kV line between the 400/230-110 kV Substation at Kayathar and the Tuticorin 230kV Substation as an interim arrangement.

3.13. The Petitioner incurred an additional and non-estimated Project cost of around INR 4,50,00,000 (Indian Rupees Four Crores Fifty Lakhs only) solely due to the 1st Respondent's failure to fulfill its obligations of providing appropriate evacuation facilities, which cost was agreed to be reimbursed by the

1st Respondent. The 1st Respondent thoroughly reneged on its promise to reimburse the cost incurred and further also compelled and coerced the Petitioner to provide an undertaking waiving the cost incurred, to permit commissioning of the 230 kV DC line.

3.14. The Petitioner could not complete development and commissioning of the entire Project since the 230 kV line from the 400/230-110 kV Substation at Thennampatty connecting to the existing 230 kV line between the 400/230-100 kV Substation at Kayathar and the Tuticorin 230 kV Auto Substation is not capable of evacuating the entire 200 MW of Project capacity.

3.15. The Petitioner has been rendered unable to develop the Project completely since the 400 kV HV line connecting the 400/230-110 kV Substation at Thennampatty and the 400 kV Substation at Kayathar is unfinished and un-commissioned.

3.16. The 1st Respondent is obligated to open a stand-by (back up) Letter of Credit for an estimated value of one-month bill valid upto a period of one year. The 1st Respondent is also obligated to renew the said letter of credit year after year for the value based on average value of previous 12 months' bills. The letter of credit will be revolved by the 1st Respondent in the event of invocation by the Petitioner / PPRE due to non-payment by the 1st Respondent of energy charges within the stipulated time period under the EPA.

3.17. The 1st Respondent has not remitted any payment whatsoever since the commissioning of about 25% of the Project by PPRE. Despite multiple reminders and requests including those dated 28.12.2018 by PPRE and 12.03.2019 and 09.04.2019 by the Petitioner to remit payment lawfully due to PPRE (and consequentially to the Petitioner), the 1st Respondent has not done so. Further, the 1st Respondent has also not provided Letters of Credit in favor of PPRE till date in complete violation of the PPRE EPA.

3.18. Despite assuring the Petitioner that it would reimburse the costs incurred for the construction and commissioning of the 230 kV DC lines (developed as an interim measure), the 1st Respondent has reneged on its obligation and failed to provide thereimbursement.

3.19. From the time of availability of evacuation facilities, the Petitioner would require further time of 15 (fifteen) to 18 (eighteen) months to commission the remaining 150 MW. Under these circumstances and being left with no other option, the Petitioner addressed a communication dated 02.04.2019 to the 1st Respondent requesting extension of the commissioning date for the Project.

3.20. In response to the said letter, the 1st Respondent has issued the communication dated 30.04.2019 to the Petitioner stating arbitrarily, unreasonably and illogically that such extension is not viable and since the Project was not commissioned by 19.01.2019, it is at liberty to act as per the

provisions of the RfS and further levy liquidated damages for the un-commissioned capacity.

3.21. Without the completion and commissioning of the 400 kV HV lines, and the 230 kV bays at the Onamakulam Substation, which is required to be achieved by the 1st Respondent, the Project cannot fructify. The Petitioner cannot face financial hardship and reputational loss for the 1st Respondent's failure to fulfill its obligations whereby the 1st Respondent will be unjustly and illegally enriched. The communication issued by the 1st Respondent dated 30.04.2019 has therefore, been issued without any jurisdiction since the deciding authority to extend the commissioning date for the Project is the Commission.

3.22. The invocation of the PBG will not only impact the Petitioner financially but also taint the reputation of the Petitioner. In an industry that banks on consistency, invocation of the PBG will cause considerable reputational loss among the customers and credibility with the financing parties and banks.

3.23. The 1st Respondent is having financial constraints and that it almost has no funds left with it, it is reasonably apprehended by the Petitioner that the 1st Respondent will invoke the PBG for no default attributable to the Petitioner.

3.24. The delay in the commissioning of the project is solely due to the 1st Respondent's failure to ensure evacuation and attempting to invoke the PBG for the 1st Respondent's failure will cause irretrievable financial harm and irreparable reputational damage to the petitioner.

6. Contentions of the Respondent in I.A. No. 3 of 2019 in D.R.P. No. 5 of 2019:-

6.1. As per the agreement between the parties herein and due to the failure on the part of the petitioner, the respondents may be allowed to encash the Performance Bank Guarantee dated 17.10.2017 for an amount of Rs.20,00,00,000 as liquidated damages under clause 16(b) of the PPA dated 19.10.2017.

6.2. The TANGEDCO had proposed to procure wind power from private developers within the State of Tamil Nadu through reverse e-bidding process as detailed below:

- (i) To achieve the nationwide target of 175 GW of Renewable Energy (RE) Power by 2020 of which 60 GW for Wind Power fixed by Ministry of Power, Government of India.
- (ii) To comply with the 9% Non-Solar Renewable Power Obligation (RPO) fixed by Tamil Nadu Electricity Regulatory Commission (TNERC) issued vide Notification No. TNERC/RPO/19-4, dated 07.03.2016.

(iii) Initially, the TNERC vide order dt:02.06.2017 in M.P. No.10 of 2017 gave the in-principle approval for proceeding with the Tender as per the draft guidelines issued by Ministry of New and Renewable Energy (MNRE) vide notification F.No.66/183/ 2016-WE, dated 22.10.2016.

6.3. Clause 26.0 of the tender specification approved by the TNERC stipulates:

“26.0 Commissioning:

(a) Part Commissioning:

Part Commissioning shall be accepted for the total 50% biddencapacity. Part commissioning will not be to projects having capacity of 10 MW or less.

(b) Commissioning Schedule and Liquidated Damages for Delay in Commissioning:

The Wind power Project shall be commissioned within 15 months from the date of signing of Energy Purchase Agreement. In case of failure to achieve this milestone, TANGEDCO shall encash the Performance Guarantee in the following manner:

Delay upto Five months:

TANGEDCO will encash the Performance Bank Guarantee on per day basis and proportionate to the Capacity not commissioned, with 100% encashment for 5 months' delay beyond stipulated commissioning period of 15 months.

Delay beyond five months:

In case the commissioning of project is delayed beyond 5 months, the WPG shall, in addition to 100% encashment of Bank Guarantee, pay TANGEDCO a sum of Rs. 10,000/- per MW per day of delay for the delay in such remaining Capacity which is not commissioned.

The max/mum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantee and payment of Liquidated Damages shall be 10 months from the scheduled date of commissioning. The amount of Liquidated Damages worked out as above shall be recovered by TANGEDCO from the payments dues of the Project Developer on account of Sale of Wind Power to TANGEDCO. In case, the Commissioning of the Project is delayed beyond 10 months from the scheduled date of commissioning, the EPA capacity shall stand reduced / amended to the Project Capacity Commissioned and the EPA for the balance Capacity will stand terminated and shall be reduced from the selected Project Capacity. Also, if the project is not commissioned beyond 10 months from the scheduled date of commissioning, the EPA will be terminated.

6.4. Knowing fully well of the commissioning schedule, the petitioner participated in the Tender and the Letter of Intent (LoI) dated 21-9-2017 was issued. The petitioner signed the Power Purchase Agreement (herein referred to as PPA) with the

respondents on 19-10-2017. It is pertinent to state that even in the PPA, the commissioning schedule and subsequent Liquidated Damages (herein referred to as "LD") for delay in commissioning the project has been clearly mentioned in clause 16.0 of the PPA.

6.5. As per clause 16 of PPA, the project commissioning schedule is as follows:

- a. Date of signing of PPA with the respondent : 19.10.2017
- b. Schedule date of commissioning as per PPA is 15 months from the date of signing of PPA : 18.01.2019
- c. Last date for commissioning the project with 1st 5 months extension with encashment of performance Guarantee worth Rs.20 Crores as Liquidated damages by TANGEDCO. : 18.06.2019
- d. Last date for commissioning the project with 2nd 5 months time extension on payment of Liquidated damage of Rs.10,000/- MW/Day totaling to Rs.30.00 crores by way of producing PBG in advance : 18.11.2019

The said PPA is valid up to 18.11.2019 with the above conditions.

6.6. If the petitioner is not able to commission the project within the commissioning period of 15 months from the date of the signing of PPA, the PPA itself grants 5 month's time extension with Liquidated Damages of Rs.10 Lakhs/MW which was accepted by the petitioner and given in the form of Performance Bank Guarantee (herein referred to as PBG) which was invoked if the petitioner did not commission the project within extended commissioning term of 5 months from the scheduled commissioning date of 15 months.

6.7. The Petitioner's project was granted 230 KV connectivity in the existing TANTRANSCO Thennampatty 400 KV substation, for evacuation of power from the 200 MW project of the petitioner. The petitioner had to erect a 230/33 KV pooling Substation at Onamakulam and 230 KV and EHT line upto the bay in the TANTRANSCO Thennampatty 400 KV Substation, for evacuation of 200 MW of power as per the PPA. But so far, even after a lapse of nearly 2 years from the date of signing of PPA, the work of establishment of proposed Onamakulam 230 / 33 KV Pooling station has not yet started. The act of the petitioner clearly shows the lack of commitment to stick to the conditions laid down in the PPA to complete the project within the time schedule mandated in the PPA.

6.8. M/s. Purushothama Perumal Renewable Energy Pvt. Ltd, one of the SPV formed by the petitioner, without completing the work of proposed 230KV Pooling SS at Onamakulam area, had erected only 22.5MW (15 Nos. of WEG with 1.5MW each) of WEG's and requested temporary / interim connectivity vide letter dated 09.04.2018 requesting connectivity to the existing Kadampur 33/11 KV SS. The same was considered by TANGEDCO with the intention of encouraging the project and temporary connectivity was given on 23.04.2018 for commissioning 22.5 MW of the project. The petitioner has commissioned another 25.5MW (17Nos. of WEG with 1.5MW each) subsequently.

6.9. Since the petitioner had not completed the pooling substation and its 230 KV Extra High Tension (EHT) Transmission line, the petitioner has further requested connectivity through 110 KV SS erected at Therkumayilodai 110/33KV SS for other purpose by the petitioner against the awarded connectivity at 230KV voltage level, vide letter dated 28.06.2018. This was also considered and connectivity was given at TANTRANSCO Thennampatty 400/230-110 KV Substation on 17.07.2018 for the capacity of 48.0 MW.

6.10. The allegation that the bay is not available at Thennampatty 400/23-110 KV Substation is wrong and misleading. The allegation is being made before the Commission so as to delay the encashment of PBG due to its lack of incapability to commission the project as per the PPA. The Thennampatty 400/230-110 KV Substation was commissioned on 08-10-2018 i.e. well before the last date for commissioning the project i.e., 19-1-2019 as per the date of signing of PPA. The statement of the petitioner that 400 KV line is not completed, which caused delay in evacuation is denied. TANTRANSCO has made alternate arrangement of evacuating the power from the petitioner's project, subject to the readiness of the petitioner to commission their project. TANGEDCO has already provided evacuation for 48.0MW and is ready at any point of time to evacuate the power. The non-completion of 400 KV line is not a constraint as claimed by the petitioner, and it is under the scope of TANGEDCO to provide evacuation facility. It is not mandated in the agreement that TANGEDCO would provide

connectivity only after completion of 400 KV line. It is the lookout of TANGEDCO to provide connectivity to the petitioner in any way as per the terms of the agreement. At no point of time during the tenure of the PPA, has TANGEDCO denied evacuation or communicated its inability to provide evacuation.

6.11. The petitioner admits that he is generating power from its 48 MW project out of 200 MW from March 2018 itself which proves that TANGEDCO is ready to make all efforts to evacuate power if generated by the petitioner since TANGEDCO is in need of wind power for fulfilling its RPO compliance. The non-commissioning of the project by the petitioner will force TANGEDCO to purchase power from the market at higher rate causing loss to TANGEDCO and in turn to the general public.

6.12. The Special Purpose Vehicle (SPV) M/s.PurushothamaPerumal Renewable Energy Pvt. Ltd, (PPREL) is a different entity and the petitioner has no *locus standi* to raise the same in the Dispute Resolution Petition. The petitioner has mixed the issue in the commissioned project to the issue of non-commissioning of the project which are two separate issues to be dealt separately as per the PPA terms available. The petitioner is hiding its inability to commission the project with the payment issue which is not legally tenable. As stated already, the alleged delay in payment of a sum of about Rs.10 Crores to a different entity is not maintainable for seeking any relief in this Petition. In any case, the project having a cost of

around Rs.1000 Crores that failed to see any light due to the failure of the petitioner cannot rely on non-payment of Rs.10 Crores. However, subsequently partial payment out of Rs.10 Crores has been made to the SPV, M/s.Purushothama Perumal Renewable Energy Pvt. Ltd.

6.13. The PBG is one way of securing the loss caused to the procurer due to non-compliance with the committed time frame in the Tamil Nadu Transparency in Tenders Act, 1988. If this avenue is blocked then the whole tendering process becomes meaningless and becomes a precedent for diluting the whole tenor of the statute and the contracts entered into from time to time.)

6.14. Invoking the bank guarantee as per the tendering specification and PPA terms is the right of the procurer to discourage the non-serious player in the tender failing which the whole tendering process becomes meaningless. The petitioner's failure in taking any step in aid of the project for several months after the signing of the agreement disentitles it to any discretionary relief. The respondents are the ones who have to bear the responsibility and financial burden of ensuring that its consumers are not impacted by the failure of generators such as the petitioner herein to supply committed energy and the respondents cannot do this without the performance bank guarantee

7. Contentions of the Respondent in the Main Petition:-

7.1. In the counter affidavit filed on the main petition, the respondent reiterated its contention raised in its I.A.No.3 of 2019. In addition to that, it has also been contended as follows:

7.2. Invoking the bank guarantee as per the tendering specification and PPA terms is the right of the procurer to discourage the non-serious player in the tender failing which the whole tendering process becomes meaningless.

7.3. The evacuation facility was made available to the petitioner and TANTRANSCO was ready to give connectivity at any point of time to commission the petitioner's project if the petitioner was ready to commission the project.

7.4. Due to delay in commissioning the balance 152 MW of wind project, the TANGEDCO is denied of 152 MW wind power which affects its energy planning which in turn causes financial loss more than the bank guarantee given by the petitioner and TANGEDCO may be forced to purchase RE power from open market.

7.5. Further TANGEDCO is committed to purchase @ Rs.3.42 per unit as per the PPA if the project is commissioned as per the commissioning schedule even though the wind Tariff has been drastically reduced to Rs.2.44 per unit. Even the TNERC tariff rate as per the Tariff Order No.6 of 2018, is only Rs.2.80/- per unit.

7.6. If the petitioner is allowed to block the encashment of bank guarantee, it will make the very fair tendering process meaningless and escape from the penalty for its lapse in commissioning the project in accordance with the agreement which in turn will make all the agreement vulnerable.

7.7. In fact, the respondent deserves to claim more compensation from the petitioner by way of difference in cost of purchase from the tendered rate of Rs.3.42 per unit which is only due to non-commissioning of the project.

7.8. Further the evacuation capacity of 200 MW is blocked by the petitioner and becomes idle due to non-commissioning of the project which will otherwise be beneficially utilized for other project, since this evacuation facility is made with huge financial outlay of Rs.418.88 Crores from the public money.

7.9. Except as stated above, all other averments and grounds raised in the Dispute Resolution Petition are denied. In view of the position stated above, the petitioner is neither entitled to the main relief nor Interim relief(s) as prayed for in the above Dispute Resolution Petition. As such both have to be dismissed as not maintainable.

8. Project Report filed by the Petitioner:-

8.1. The first respondent invited bids to establish, maintain and operate wind power plants of 500 MW in the State of Tamil Nadu at the rate to be finalized

through reverse bidding, considering the fixed tariff ceiling of INR 3.46 (Indian Rupees Three and Paise Forty Six) per unit as the upper limit. Tender specifications through Request for Submission document no. CE/NCES/O.T No.2/2017-18 ("**RfS**") was issued for this purpose. Upon perusing the request for submission document issued by the 1st Respondent and upon responses issued by the 1st Respondent to the pre-bid queries raised by potential bidders, ReGen proceeded with completion of the pre-bid formalities:

- Furnishing application processing fee:
- Furnishing bank guarantee for submission of bid
- Submitting a certificate from its Chartered Accountant certifying its net worth
- Submission of its annual audited accounts
- Furnishing its PAN Card and TIN details
- Submission of undertaking regarding supply of power
- Submission of scanned executed copies of the "Request for submission document" and "Reply to Pre-Bid Queries"

8.2. The Petitioner participated in the bidding process and submitted its bid to sell the generated wind power to the 1st Respondent at the rate of INR 3.42 (Indian Rupees Three and Paise Forty Two) per unit. After being satisfied with the Petitioner's capability to develop and commission the wind power project and also due to the Petitioner quoting the lowest bid in the said Tender, the 1st Respondent selected the Petitioner as one of the successful bidders. The 1st Respondent agreed to purchase the power generated at the rate of INR 3.42 (Indian Rupees Three

and Paise Forty Two) per unit and issued a Letter of Intent to the petitioner vide Lr.No.CE/NCES/ SE/ SOLAR/ EE/WPP/AEE2/F.M/s. ReGenPowertechPvt. Ltd. D.2067/17 dated 21.09.2017 ("**LOI**") on the terms and conditions specified under the RfS. It is pertinent to note that even though the ^{1st} Respondent had invited bids for 500 MW, the Petitioner was conscious of its ability and capability to undertake the project and applied for 200 MW only, which it was granted ("**Project**")

8.3 The Petitioner has completed nearly 50 MW of the Project. For the remainder of the project, the Petitioner has identified project site based on the availability of land and has carried out wind resource assessments and prepared an Annual Energy Production report. The Petitioner has appointed land aggregators for acquiring the land and monies amounting to over 10.00.00.000/- (Indian Rupees ten crores only) have been advanced for the same. Of the identified locations a total of 7 sites have been conveyed in the name of the Petitioner towards the remaining 150 MW of the Project. Conveyance / lease of additional sites required for the remaining locations towards the 150 MW is pending payment to the aggregators and land owners upon achievement of financial closure by the Petitioner.

8.4 The Petitioner has further approached the ^{1st} Respondent and filed its evacuation application, paid necessary charges for conducting load flow studies and field verification and have successfully obtained evacuation approvals from the ^{1st} Respondent.

8.5. On 23.09.2017, the Petitioner made payment of INR 1,50,000/- (Indian Rupees One Lakh Fifty Thousand Only) for conducting load flow studies at the proposed 200 MW wind power plant at Onamakulam Village, Ottapidaram Taluk, Tuticorin District. As a result of the load flow study, the Petitioner was required to furnish the following documents:

- Registered sale deed/lease deed for the proposed sub-station land on or before 3 months from the date of signing of PPA;
- Project Layout;
- Village map and topographical sketch and
- Detailed Project Report with a work completion schedule.

8.6 On 17-10-2017, the petitioner furnished a performance bank guarantee for an amount of Rs.20,00,00,000/- (Indian Rupees Twenty Crores Only) corresponding to Rs.10,00,000/- (Indian Rupees Ten Lakhs Only) per MW. Subsequently, on 19.10.2017, the Petitioner and 1st Respondent entered into an Energy Purchase Agreement ("EPA") for the establishment and development of the Project. On 12.12.2017, the Petitioner requested to split the allocated capacity of 200MW into four blocks each of 50MW capacity to be set up under different special purpose vehicles (SPVs) in the following names:

- Purushothama Perumal Renewable Energy Pvt. Ltd.
- Soundararaja Perumal Renewable Energy Pvt.Ltd.,
- Srimoorthi Perumal Renewable Energy Pvt.Ltd.,
- Vaikundananda Perumal Renewable Energy Pvt.Ltd.,

8.7 Accordingly, an Addendum to the EPA dated 20-03-2018 ("Addendum to EPA") was executed to split the EPA into 4 projects of 50 MW each in the name of 4 subsidiaries wholly owned by the Petitioner incorporated specially for the purposes of this Project (special purpose vehicles). The addendum to EPA also recorded that M/s.PurushotamaPerumal Renewable Energy Pvt.Ltd., ("PPRE") would undertake the commissioning of the first 50 MW on submission of a performance bank guarantee for INR 5,00,00,000 (Indian Rupees Five Crores only). Therefore, the EPA was amended to reflect that the Petitioner would undertake the remaining 150 MW by itself or through its other three wholly owned subsidiaries. A separate energy purchase agreement between PPRE and the 1st Respondent was signed on 20.03.2018 recording the terms and conditions to develop and commission 50 MW ("PPRE EPA"). Consequently, PPRE furnished the requisite bank guarantee of INR 5,00,00,000 (Indian Rupees Five Crores Only) corresponding to INR 10,00,000/- (Indian Rupees Ten Lakhs Only) per MW.

8.8 On 16.05.2018, the Petitioner sought for early commissioning of ongoing Thennampatty 400/230-110 kV substation, since the pooling substation(s) were firstly to be connected in the 230 kV and 110 kV side of Thennampatty 400/230-110 kV substation and to be stepped up and transmitted from the 400 kV side of the Thennampatty 400/230-110 kV substation through a 400kV line to Kayathar 400kV substation. Owing to the fact that there were delays in the commissioning of the 400 kV line by the 1st Respondent, on 25.03.2018, the Petitioner voluntarily and proactively proposed an alternate interim arrangement to commission the 5km 110 kV line from the Petitioner's pooling substation to the Thennampatty 400/230-

110 kV substation. The Petitioner further installed and commissioned the necessary 2.89 km of 230-kV DC line on DC tower from the Thennampatty substation connecting to the existing 230 kV line between the 400/230-110kV substation at Kayathar and the Tuticorin 230kV auto substation as an interim arrangement on full reimbursement basis on 03.07.2019 the 1st Respondent agreed for such interim arrangement until the completion of the 400 KV line and agreed to provide full reimbursement for the same. On 06-08-2018, upon receipt of debit note from the 1st Respondent, the Petitioner made payment of INR 3,37,14,900/- (Indian Rupees three crores thirty seven lakhs fourteen thousand nine hundred only) for reserving one 230 KV bay at the Thennampatty substation. On 11-09-2018, under duress and being coerced by the 1st Respondent, the Petitioner provided an undertaking to not claim any reimbursement from TANTRANSO for the erection of the interim 230 KV line. Further, the Petitioner was constrained to give an undertaking that it would dismantle the interim 230 KV line erected by it entirely at its own cost upon the commissioning of the 400 KV line. It is pertinent to mention that as on the date of filing this status report, the evacuation of power from the completed nearly 50 MW is being conducted by the said interim 230 KV line built by the Petitioner only. In fact, the Petitioner is ready and willing to dismantle the 230 KV line set up by it as the interim arrangement, but is unable to do so due to there being no confirmation of the operation of the 400 KV line by the 1st Respondent and since the 1st Respondent has not permitted/provided connectivity to the said 400 KV line until date. The

Petitioner has approximately made investments of INR 4,40,00,000/- (Indian Rupees Four Crores and Forty Lakhs only) for the purposes of setting up of the said interim arrangement.

8.9 On 20.09.2018, the Petitioner completed the entire 230 kV DC line for evacuation of power from Thennampatty substation under the supervision of TANTRANSCO officials and the line was ready for charging. On 26.09.2018, the Petitioner requested TANTRANSCO for commissioning of Thennampatty substation at the earliest to enable commissioning of the Petitioner's pooling substation. The Petitioner had also completed construction and testing of the 110 kV Bay tering arrangement work at Thennampatty 400 kV substation and 110 kV SC line on DC tower from 400kV Thennampatty substation to its 110/33kv. Further, the Petitioner had completed the erection of all the equipments and testing works of all equipments, protection and relay paneling on the 110/33 kV pooling substation at Onamakulam. On 29.09.2018, TANTRANSCO issued a certificate for commissioning of the 230 KV DC alternate line arrangement by the Petitioner. On 08.10.2018, TANTRANSCO issued a certificate for commissioning of the 110/33 KV substation at Therukumayildolai and 110 KV SC line. The interim arrangement made by the Petitioner was entirely out of its own funds and on its own effort. The Petitioner had to make substantial investments in this regard and took several steps to ensure that the first phase of the project was completed well before the date of commissioning. To achieve this, the Petitioner procured several equipment and carried on civil work.

The purchase orders issued for procurement of the said materials and work orders also evidences the investment made and efforts taken by the Petitioner, over and above its contractual and statutory duties. The purchase orders and work orders that were issued can be provided upon directions. The Petitioner was threatened by TANTRANSCO and the 1st Respondent into providing the undertaking, failing which TANTRANSCO and the 1st Respondent would not permit the charging and commissioning of the 230 kV DC line connecting to the existing 230 kv line between the 400/230-110kV substation at Kayathar and the Tuticorin 230 kV auto substation.

8.10 By November 2018, the Petitioner's SPV, PPRE had successfully commissioned nearly 50 MW by erecting 32 wind energy generators. In fact, it is an admitted and acknowledged fact by the 1st Respondent that the Petitioner had commissioned 15 wind energy generators by March 2018 itself. The Petitioner sought for payments from the 1st Respondent for the sale of energy vide letter dated 28.12.2018. As on date, the 33rd wind energy generator is also erected and is awaiting for commissioning.

8.11 Subsequently, for the further development of the remaining 150MW, the Petitioner approached and sought financial assistance from several financial institutions, but was unable to obtain any such assistance due to the delay in payments made by the 1st Respondent for the already commissioned nearly 50 MW and also due to the failure of the 1st Respondent in providing revolving letter of credit as payment security for the commissioned 50 MW. The Petitioner constantly

followed up with the 1st Respondent for release of payments and addressed communications in this regard. Until the instant petition was filed by the Petitioner, the 1st Respondent had not released any payment towards the generated power by PPRE.

8.12 The Petitioner commissioned 50 MW despite difficult circumstances faced at the project site owing to civil commotion and the consequent order of the Government authorities and they have been generating and delivering power to the 1st Respondent since March 2018.

8.13 In any event, the land required for the pooling sub-station has already been acquired and the construction of bay has been completed and taken over by the Petitioner. Further the 100 MVA power transformer is ready for dispatch to the 230 KV pooling substation from the manufacturer's premises in Chennai.

8.14 Due to the lack of clarity on the status of commissioning of the 400 KV line, the Petitioner has not yet placed an order for the second 100 MVA power transformers to be dispatched to its pooling substation. Upon receipt of confirmation of the same, as well as extension of commissioning date, the second 100 MVA transformers will be dispatched and civil work required for the commissioning will be undertaken.

8.15 Since the commencement of the project until this date, the Petitioner has been actively working towards the development of the Project within the prescribed

timelines. Delays that have occurred have been owing to the inactions of the 1st Respondent which have had a domino effect on the development of the Project. In spite of the obstacles faced by the Petitioner, the Petitioner was able to complete the first phase of the Project. However, any temporary measures taken by the Petitioner was found to be technically insufficient for the completion of the entire project. The Petitioner evaluated and analyzed the possibility of setting up other temporary arrangements for the purpose of completion of the project, the same was found to be technically unaviable.

8.16 In light of the non-availability of evacuation facilities, while all efforts are being expended by the Petitioner, neither financial closure nor acquisition completion could be completed for the project because of the uncertainty in whether or not the evacuation facilities will be provided at all and consequently, whether the investment in the Project will yield any results at all. The entire project has come to a standstill inasmuch as the development of a project requiring about Rs.900,00,00,000 (Indian Rupees Nine Hundred Crores) has become currently unfeasible for the Petitioner since power cannot be evacuated even if commissioned. It is only upon the evacuation bays being made available and provision of said facilities can the further development of the project commence in as much as the pooling substation, EHV line and bay expansion work are dependent on the availability of the evacuation bay. The erection of the wind turbine generators and the unit substation, etc., must be constructed only upon confirmation of the evacuation facilities and obtaining financial closure which depends thereon. Further, equipment and material required at the substation, in

general terms, must necessarily be setup within 6 months of its manufacture, as per the safety standards. Therefore, the said equipment can be manufactured only upon operation of the 400 KV line. The Petitioner is committed towards completion of the Project and will, upon availability of the evacuation facilities and consequent financial closure, endeavour to commission the Project in an expedient manner.

8.17 With regard to obtaining financial closure, the Petitioner approached and negotiated with several project lenders for the purpose of obtaining term loan for the Project or at-least achieving financial closure. As stated earlier, the Petitioner had difficulty in any financial lending owing to the lack of payments from the 1st Respondent for the already commissioned 50 MW. Further the 1st Respondent failed in its obligations under the EPA in opening revolving letters of credit, which further deterred lenders from providing financial support to the Petitioner. To make matters worse, due to the unavailability of the evacuation facilities and the lack of clarity on when it will be available, lenders refused to provide any credit facility for the Project to the Petitioner. However, the financial institutions have expressed their intention to provide requisite credit facilities in the form of term loan / project loan, cash and non-cash credit facilities for setting up the project provided the evacuation infrastructure is completed and payment security is provided by the 1st Respondent prior to issuance of sanction letter.

8.18 The Petitioner has developed the project so far as it was possible. However several critical and integral parts of the project remain to be

completed, which can be completed only pursuant to the availability of the evacuation facilities.

8.19 Upon permanent evacuation facilities being made available and payment security being provided to the Petitioner, it will obtain financial closure and the Lender will resume release of funds and subsequent financial drawdown, pursuant to which, the remainder of the Project will be undertaken.

9. Project Report filed by the Respondent:-

9.1. As per the PPA and load flow study conducted, the project of 200 MW to be developed by the petitioner is to be connected in the Thennapatty 400/230-110 KV SS developed by TANTRANSKO for RE evacuation.

9.2. The Thennapatty 400/230-110 KV SS is sanctioned by the Board vide B.P. No. 70, dt: 22.07.2014 at a cost of Rs 418.88 Crores. The Thennapatty 400/230-110 KV SS has the capacity of 1050 MW.

9.3. The Thennapatty 400/230-110 KV SS with 6 Nos. 230 KV bay (the inter connection point of the generator) and 6 Nos. 110 KV bays and commissioned on 08.10.2018.

9.4. As such, the Thennampatty 400/230-110 KV SS can evacuate the full power generated from the petitioner's projects of 200 MW, if commissioned.

9.5. The 400 KV Thennampatty to Kayathar line was completed and commissioned on 27.05.2019. However, this 400 KV line will be utilized only during the excess export generation from the Thennampatty 400/230-110 KV SS and so delay or non-commissioning of this 400 KV line is not a prerequisite for evacuation of 200 MW of the petitioner's project.

9.6. The petitioner has to erect the 230/33 KV pooling Substation at Onamakulam area as per the PPA to evacuate 200 MW power from the petitioners project. The petitioner has not yet started the work of this 230/33 KV pooling Substation nor the 230 KV tie line to the Thennampatty 400/230-110 KV SS, till date.

9.7. The petitioner on not being able to complete this Onamakulam 230/33 KV pooling SS work, had requested for interim alternate connectivity for their partly commissioned Wind Turbine capacity of 48 MW through the other Therukumayilodai 110/33 KV 10(1) pooling Substation which was developed for some other project of the petitioner other than this 200 MW project. This was also considered on good faith to evacuate the power and the petitioner commissioned their 48 MW project through this interim alternate arrangement until commissioning of Onamakulam 230/33 KV SS.

9.8. This interim arrangement through the Therukumayilodai 110/33 KV 10(1) SS has the evacuation capacity of 100 MW and the petitioner has not been able to utilize this balance loading capacity of 52 MW project commissioned till date which shows the petitioners lack of commitment to commission the project.

9.9. Further the non-commissioning of the project by the petitioner denies the TANGEDCO the legitimate RE power to an extent of 152 MW which is needed for fulfilling the Renewable Purchase Obligation (RPO)

9.10. Since the TANGEDCO has fulfilled its obligation under PPA, and also deprived of the legitimate RE power interim prayer of the petitioner may be dismissed and TANGEDCO may be allowed to invoke the performance bank guarantee to partially offshoot the losses to the TANGEDCO.

10. Hearing held on 25-02-2020:-

In the hearing held on 25-02-2020, it was submitted before the Commission that the company has been referred to I.R.P. and I.R.P. has to further prosecute the matter and brief arguments were heard.

11. Written Arguments filed on behalf of the Petitioner:-

11.1. ReGenPowertech Private Limited ("ReGen") is one among the largest manufacturers of multi megawatt direct drive (gearless) WECs with permanent magnet technology in Indian market and provides full turnkey installations for wind power projects. ReGen has a technology licence agreement with Vensys of Germany for 1.5 MW / 2.5 MW and 3 MW synchronous permanent magnet gearless turbines. The permanent magnet generators are manufactured at the state of the art facility at Tada, Andhra Pradesh with a capacity to manufacture 500 WECs per annum. ReGen's in house production comprise of Permanent Magnet Generators, Hub assembly, Nacelle assembly and Frequency Converters. The towers and rotor blades are outsourced from reputed vendors.

11.2. It is industry wide practice that any power generating company, while undertaking a project of the nature that is similar to the subject matter of this dispute, upon being awarded with the project, will obtain financial closure by raising funds from third party lenders to complete the project, and the returns from the project will be utilized for repaying the lending facilities obtained. Subsequently, power generating companies procure lands for the purpose of setting up the wind power generation project in consultation with the state utility boards which provide them the said project. Power generating companies will also approach OEM companies for the supply erection and commissioning of wind turbines on turn-key basis to produce power and supply to the concerned state utility. Accordingly, the Petitioner has been conducting its business of generation and supply of power over the last 40 years.

11.3. The 1st Respondent approached this Commission under M.P. No. 10 of 2017 and pursuant to the approval dated 02.06.2017 and 10.7.2017 granted by this Commission, invited bids to establish, maintain and operate wind power plants of aggregate capacity of 500 MW in the State of Tamil Nadu at the rate to be finalized through reverse bidding, considering the fixed tariff ceiling of INR 3.46 (Indian Rupees Three and paise forty six) per unit as the upper limit. Thereafter, Tender specifications through Request for Submission document no. CE/NCES/O.T No.2/2017-18 ("**RfS**") was issued by the 1st Respondent for this purpose.

11.4. The Petitioner attended the pre-bid meeting called for by the Respondents to clarify any queries that potential bidders had in relation to the Project. A specific query was raised by a wind power developer pertaining to connectivity issues, since the RfS (under clause 17.0 (iii)) places the entire responsibility of obtaining connectivity within the time period on the wind power developers has stated in its reply to the Pre-Bid queries that **"the evacuation infrastructure will be made available in time"** and based on that assurance, wind power developers were constrained to forego deemed generation based payments. It is pertinent to state here that it is well known that wind-power developers such as this Petitioner are never in a position to negotiate terms of the project and the developers are forced to accept all such terms and conditions placed upon it by State Utility Boards. Thus, the 1st Respondent has admitted to and accepted its responsibility to make evacuation infrastructure facilities available in a timely manner, having recognized, agreed and acknowledged that time is the essence in such projects. It is solely based on representations made by the Respondents in the RFS and the responses to the pre-bid queries, including the above said representation, did the Petitioner submit its bid for the Project.

11.5. The Petitioner fulfilled and demonstrated its ability to fulfill the following technical and financial requirements in order to qualify for the bid:

"Technical requirements:

- a. *Deploying a WTG with a type **certificate listed in the Revised List of Models and Manufacturers (RLMM)** released by MNRE.*

- b. Wind forecasting to be carried out as per the Indian Electricity Grid Code, 2010 and communicating the same to the State Load Despatch Center (SLDC)*
- c. Providing the LVRT arrangement before commissioning of the WTGs.*
- d. Forecasting wind turbine generation.*

Financial requirements:

- a. Net worth of Leap Green was greater than the value calculated at the rate of Rs. 10 Lakhs (Rupees Ten Lakhs) per MW of the proposed project capacity. To evidence fulfillment of this criteria, the Leap Green had submitted annual audited accounts of the previous 3 (three) financial years and a certificate from a Chartered Accountant to demonstrate the fulfillment of the criteria.*
- b. Bank Guarantee for an amount of INR 62,50, 000 (Indian Rupees Sixty two lakhs fifty thousand) in lieu of Earnest Money Deposit was submitted to the Respondent."*

11.6. The Petitioner participated in the bidding process and submitted its bid to sell the generated wind power to the 1st Respondent at the rate of INR 3.42 (Indian Rupees Three and Paise Forty Point Four Two) per unit. It is pertinent to state that the Petitioner was the lowest bidder and other bidders were asked to match the price offered by this Petitioner, thereby ensuring success of the bid for the entire 500 MW capacity approved by this Hon'ble Commission. The Respondents selected the Petitioner as the successful bidder and issued a Letter of Intent vide

Lr.No.CE/NCES/SE/SOLAR/EE/WPP/AEE2/F.M/s.RegenPowertech Pvt. Ltd. D.2067/17 dated 21.09.2017 ("LoI") on the terms and conditions specified under the Tender.

11.7. The Petitioner and the 1st Respondent executed an Energy Purchase Agreement on 19.10.2017 ("EPA") for establishment of the 200 MW wind power project ("Project") at Therkumayilodai Village, Ottapidaram Taluk, Tuticorin District. An Addendum to the EPA dated 20.03.2018 ("Addendum to EPA") was executed to split the EPA into 4 projects of 50 MW each in the name of 4 subsidiaries wholly owned by the Petitioner incorporated specially for the purposes of this Project. The addendum to the EPA also recorded that M/s.Purushotama Perumal Renewable Energy Private Limited ("PPRE") would undertake the commissioning of the first 50 MW on submission of a performance bank guarantee of INR 5,00,00,000/- (Rupees five crores only). It is pertinent to mention that almost all the power projects are executed by an entity through the SPVs which is anyway permitted by the Respondents in its PPAs. Therefore, the EPA was amended to reflect that the petitioner would undertake the remaining 150 MW by itself or through its other three wholly owned subsidiaries. A separate energy purchase agreement **dated** 20.03.2018 was entered into between PPRE and the 1st Respondent recording the terms and conditions to develop and commission 50 MW ("**PPRE EPA**"). The Petitioner also submitted a Performance Guarantee dated 17.10.2017 (no. 010971117000029) for an amount of INR 20,00,00,000 (Indian Rupees Twenty

Crores only) ("**PBG**") at the rate of INR 10,00,000 per MW as per Clause 14 of the RfS, which has now been illegally invoked by the Respondents.

11.8. In the PBG Clause-5 states that the PBG shall be invoked based on the account settled between TANEGDCO and Petitioner which is as follows;

"5. Any account settled between the TANGEDCO and the WPH shall be conclusive evidence against the Bank for the amount due and shall not be questioned by the Bank."

11.9. Till date, no accounts were settled between the parties and therefore the encashment the PBG is illegal and PBG as such is an independent agreement and the parties must follow the terms set out therein in true spirit. Therefore, the Respondent must return the entire amount illegally encashed by them with interest until date of such return.

11.10. In Gangotri Enterprises Ltd., Vs. Union of India & Ors (SLP. (C) No. 2705 of 2012), the Hon'ble Supreme Court in Page 28 Para 43 observed the every case must be decided with reference to the facts of the case involve therein. Therefore, just because the terms of the PPA enumerates that the Petitioner is unable to achieve financial closure, the PBG will be invoked cannot be strictly followed by the Respondents, for the reason that there existed no evacuation facility for the Petitioner to proceed with the Project. On the one hand, the Respondents expect the Petitioner to comply with the terms of the PPA and on the other hand the Respondents refuse to honor its commitments pertaining to evacuation facilities.

Further, the Respondents were also not being transparent regarding the non-availability of the evacuation facility for the Petitioner to complete the Project. Therefore, since there is clearly an obstruction created by the Respondents for the petitioner to perform its obligations in a timely manner in true spirit of the PPA is clearly a breach by the Respondent or at the very least of a *force majeure* event, the principle laid down in the aforesaid judgement will apply to the present case.

11.11. The non-availability of evacuation facilities for the Petitioner is *force majeure* events in terms of the aforesaid order passed by the Hon'ble CERC. Bangalore Electricity Supply Co. Limited Petition No.248/MP/2012-CERC.

11.12. The argument of the Respondent is that the Petitioner is not the concerned party to raise the present dispute before this Commission since TANGEDCO permitted the SPV's to execute the project. It is reiterated that PPRE has executed 50 MW of the overall project by executing the PPRE EPA and the remaining three SPVs yet to execute PPA and therefore the project approved by the Respondent for the Petitioner still exists in its name and therefore the Petitioner herein has the legal right to approach this Commission for the reliefs sought in the present DRP. In any case, the 4 SPVs formed by the Petitioner as wholly owned subsidiaries of the Petitioner cannot be deemed different especially after TANGEDCO approved the execution of the Project by the said 4 SPVs.

11.13. The 1st Respondent informed the Petitioner by way of its letter dated 06.08.2018 that owing to the successful completion of the load flow study, the Petitioner was required to pay the tentative bay cost of INR 3,37,14,900/- (Indian Rupees Three Crores, Thirty Seven Lakhs, **Fourteen** Thousand and Nine Hundred Only) for reserving one 230 kV bay **at the** Onamakulam 230/33 kV substation as part of the evacuation **system**. Accordingly, the Petitioner paid the bay charges on the same day itself and was allotted a 230 kV Bay at the said substation,. It is pertinent to mention that the said substation was supposed to be interfaced with the newly established 400/230-110 kV substation at Thennampatty, which was in turn required to be connected to the already commissioned, operational 400/230-110 kV substation at Kayathar. The 400 kV voltage lines connecting the two substations were required to be installed and commissioned by TANTRANSCO by February 2018. The Respondents, have, by their own admission stated that the 400 kV HV line connected the 400 kV Thennampatty Substation and the 400 kV Kayathar; Substation ("400 kV line") was allegedly commissioned only on 27.05.2019i.e.,well after the institution of the present proceedings. It is an undisputed fact that the said lines ought to have been commissioned in the year 2018itself, and that there has been an inordinate delay by the 1st Respondent in commissioning of the line. The Petitioner is unable to understand how the Respondents expected the Petitioner to complete the commissioning of the Project without being provided with the 400 kV line. On this court alone, the Petitioner is entitled to the extension as prayed for, and also the refund of the PBG illegally invoked by the 1st Respondent. It is pertinent that till date there is no

documentary proof available before this Hon'ble Commission that were filed by the Respondents to sustain their argument that the evacuation facility was always available.

11.14. By 20.09.2018, the Petitioner completed the entire 230 kV DC line for evacuation of power from Thennampatty substation under the supervision of TANTRANSCO officials and the line was ready for charging. On 26.09.2018, the Petitioner requested TANTRANSCO for commissioning of Thennampatty substation at the earliest to enable commissioning of the Petitioners pooling substation. The Petitioner had also completed construction and testing of the 110 kV Bay metering arrangement work at Thennampatty 400 kV substation and 110 kV SC line on DC tower from 400kV Thennampatty substation to its 110/33 kV. Further, the Petitioner had completed the erection of all the equipments and testing works of all equipments, protection and relay paneling on the 110/33 kV pooling substation at Onamakulam.

11.15. The petitioner, owing to its commitment to commission the project in an expedient manner, on its own volition, efforts and funds, began to develop the project and planned the evacuation of power from the existing 110 KV bay at the Onamakulam 230/33 KV substation. The petitioner, therefore, installed and commissioned five kilometers of 110 KV lines between the Onamakulam Substation and the un-commissioned 400/230-110 KV substation at Thennampatty. Further, the Petitioner installed and commissioned 2.89 kilometers of 230 KVDC line on DC tower from the 400/230-110 kV substation at Thennampatty connecting

to the existing 230 KV line between the 400/230-110 kV Substation at Kayathar and the Tuticorin 230 kv auto substation as an interim arrangement. The Petitioner further communicated with the 1st Respondent for commissioning of 400/230-110 kv substation at Thennampatty in the light of the interim arrangement made by the Petitioner. In this process, the Petitioner incurred an additional expenditure of INR 4,50,00,000/- (Indian Rupees four crores fifty lakhs only) solely due to the 1st Respondent's failure to fulfill its obligations of providing appropriate evacuation facilities as per its commitment under the Rfs and response to pre-bid queries. Infact, the Petitioner is ready and willing to dismantle the 230 kV line set up by it as the interim arrangement, but is unable to do so due to there being no confirmation of the operation of the 400kV line by the 1st Respondent and since the 1st Respondent has not permitted/ provided connectivity to the said 400 kV line until date. The Petitioner has approximately made investments of INR 4,50,00,000/- (Indian Rupees four crores and fifty lakhs only) for the purposes of setting up of the said interim arrangement. Now that the Respondent is claiming that the said evacuation facility is available, the Petitioner has all means and capability to complete the remaining of the Project through its SPVs provided the extension of time is granted to it.

11.16. The Respondents have stated in their status report that the 400 kV line will be utilized only during the excess export generation from the Thennampatty 400/230-110 kV substation. It is pertinent to reiterate here, that currently an interim arrangement set up by the Petitioner is being utilized by the Respondents, for evacuation of power from the Thennampatty Substation to the Kayathar Substation

despite the fact that the Petitioner is entitled to dismantle the said interim arrangement upon commissioning of the 400 kV line. It is only due to the failure of TANGEDCO in providing the evacuation facility in time, the interim arrangement was set up, and the Respondents cannot take advantage of the same to state that the 400 kV line is not a pre-requisite for the evacuation of the Petitioner's project.

11.17. However, this interim measure could not be adopted for the entire Project since the 230 KV line from the 400/230-110 KV substation at Thennampatty connecting to the existing 230 kV line between 400/230-110 kV Substation at Kayathar and the Tuticorin 230 kV auto Sub-station is not capable of evacuating the entire 200 MW of Project capacity.

11.18. Infact, even with respect to the commissioned capacity by Petitioners SPV, that has been generating power since March 2018, Respondents did not remit any payment whatsoever since the very firstday of commissioning despite utilizing the power, despite repeated reminders and requests for such payments. Only in 2019, during pendency of the present proceedings, payments were made to PPRE that too without contractually payable interest and after arm twisting thePetitioner's SPV to provide discount on the amount payable despite making the said payment **20 months** after commissioning. However, the Respondents have not provided letters of credit in favor of PPRE till date. The aforementioned are obligations specifically taken over by the Respondents in the EPA as well as Rfs. Further, upon commissioning the 50 MW portion of the Project, the respondent ought to have

release the bank guarantee furnished by PPRE and the extent of the bank guarantee furnished by the Petitioner pertaining to the 1st 50 MW. However, unexpectedly, the Respondents have gone on to invoke the entire PBG furnished by the Petitioner despite the commissioning of 50 MW of the Project which clearly demonstrates the *mala fide* intentions of the Respondents. It is impossible for any power producer to keep investing through its investor or by own on the Project when there is no payment commitment and payment security from the Respondents.

11.19. The Respondents are attempting to take advantage of the above actions taken by the Petitioner, in good faith, by stating that the Petitioner could have completed the entire Project by making use of the alternate arrangements set up by the Petitioner, as an interim measure since it is technically impossible to connect and evacuate power from 200 MW Project using such interim arrangement. The Respondents have by their own admission, acceded that there had been a delay in the erection of the 400 kV line from Kayathar 400kV SS to Thennampatty 400kV SS which resulted in a delay in the commissioning of the Thennampatty 400/230-110 kV substation in their letter dated 03.07.2018. It is only due to this delay that the Petitioner approached the Respondent with the proposal for alternate arrangements. The Respondent approved the proposal on a reimbursement basis vide the same letter dated 03.07.2018. However, like a bolt out of the blue, on 11.9.2018, the Respondent coerced the Petitioner to provide an undertaking that it will not claim any reimbursement for the alternate interim arrangement set up by it. This demonstrates the highly arbitrary, unreasonable and high-handed manner in which the

Respondents have been functioning from the very beginning. The hostile attitude adopted by the Respondent is only an evidence of how unwilling it has been towards the completion of the Project.

11.20. Subsequently, for the further development of the remaining 150 MW, the Petitioner approached and sought financial assistance from several financial institutions, but was unable to obtain any such assistance due to the delay in payments made by the 1st Respondent for the already commissioned nearly 50 MW and also due to the failure of the 1st Respondent in providing revolving letter of credit as payment security for the commissioned 50 MW.

11.21. In any event, the land required for the pooling substation has already been acquired and the construction of bay has been completed and taken over by the Petitioner. Further, the 100 MVA power transformer is ready for dispatch to the 230 kV pooling substation from the manufacturer's premises in Chennai. Proof of the transformer being tested and ready for dispatch has been filed before this Hon'ble Commission. Due to the lack of clarity on the status of commissioning of the 400 kV line, the Petitioner has not yet placed an order for the second 100 MVA power transformer to be dispatched to its pooling substation in order to ensure that the Petitioner's investment in the second transformer does not result in being a wasteful investment. Upon receipt of confirmation of the same, as well as extension of commissioning date, the

second 100 MVA transformers will be dispatched and civil work required for the commissioning will be undertaken.

11.22. Since the commencement of the project until this date, the Petitioner has been actively working towards the development of the Project within the prescribed timelines. Delays that have occurred have been owing to the inactions of the 1st Respondent which have had a domino effect on the development of the Project. In spite of the obstacles faced by the Petitioner, the **Petitioner** was able to complete the first phase of the Project. However, *any temporary* measure taken by the Petitioner was found to be technically **insufficient for the** completion of the entire project. The Petitioner evaluated and analysed the possibility of setting up other temporary arrangements for the purpose of completion of the project, however, the same was found to be technically unviable.

11.23. Despite keeping the materials and ground work necessary *for* Project in a state of readiness, the Petitioner has not been able to commission the Project for reasons solely attributable to the Respondents lack of readiness and willingness to comply with obligations including regarding evacuation infrastructure, payment security and remittance of payments that were lawfully due to it coupled with lack of arrangement made by the Respondents to appropriately and permanently evacuate the power generated by the Petitioner.

11.24. The operational and financial shortcomings of the 1st Respondent has severely prejudiced the Petitioner and despite earnest intentions and preparatory actions to develop and commissioning the Project, the Petitioner has been unable to procure funds for the Project for the following reasons:

- Lack of facility to evacuate power since the 400 kV HV line connecting the 400/230-110 kV substation at Thennampatty and 400 kV Substation has not been completed or commissioned;
- The 1st Respondent's failure to make payment of INR 10,32,82,342 (Indian Rupees Ten Crores Thirty Two Lakhs Eighty Two Thousand Three Hundred and Forty Two) on time in lieu of the power generated from the party commissioned project, depriving the Petitioner of revenue rightfully due to it;
- The 1st Respondent is reneging on its assurance to reimburse the cost incurred for construction and commissioning of the 230 kV transmission lines between Thennampatty and Tuticorin Substation; and
- The lack of dependability and consistency in the 1st Respondents functioning.

11.25. The Petitioner has time and again communicated to the 1st Respondent in respect of the un-commissioned 400 kV high voltage lines connecting the substation at Thennampatty and Kayathar which has been an impediment to the development and commissioning of the Project. The 1st Respondent, while it states now that the same has been commissioned, neither has evidenced the same, nor responded to the Petitioner and the Petitioner's communications in respect of the same continue to remain unanswered. The 1st Respondent is misleading the Commission by stating that the uncommissioned 400 KV high voltage line is not an impediment to

the evacuation of power. The 1st Respondent has always been aware and had knowledge of the fact that it will not be able to provide evacuation facilities for the Petitioners Project which will result in the Petitioner being unable to commission the Project and to unjustly enrich itself by encashment of PBG. The Respondents have time and again averred that they have commissioned the 400/230-110 kV substation at Kayathar on 08.10.2018 and therefore averred that the Petitioners statement that the 400kV line is not commissioned is merely an allegation and is false. This is grossly contradictory to the commissioning certificate filed by the Respondents that indicates that the 400-kV line may have been energised only on 27.05.2019, if at all public domain information alludes to the fact that the 400-kV line was tested only in October 2019 and whether the line is presently functioning at full capacity is unknown since no proof in this regard is before this Commission. Further, the Respondents have not provided any information on whether the appropriate testing processes have been completed and if the requisite period of stabilization has also been duly completed. Therefore, today, there is no evidence before this Hon'ble Commission that the 400-kV line is fully functional. In spite of the same, the 1st Respondent has acted with *malafide* intentions and unjustly enrich itself.

11.26. The Respondents have themselves admitted that the 400-kV line was energised only on 27.05.2019. Without the availability of evacuation lines, which is evidenced by the alleged certification provided by the Respondents dated 27.05.2019 when the evacuation line was purportedly energized, the Petitioner is unable to understand how the 400/230-110 kV substation could have been

commissioned. It is not correct to state that the said substation has been ready and capable of providing evacuation facilities when it is apparent on the face of it that the Respondents are till date not capable of providing the requisite evacuation facilities. This is further evidenced by the fact that the -50 MW completed by the Petitioner is still being operated by the interim arrangement set up entirely by the Petitioner at its own cost given that the Respondents have, while admitting that it is under the scope of Respondent no. 1 to provide evacuation facility and to provide connectivity to the Petitioner, as per the terms of the PPA, failed in every manner to set up and provide or at least reimburse the Petitioner for the evacuation arrangement including the interim arrangement. No shred of evidence has been placed before this Commission to demonstrate or even indicate the alleged alternate arrangements made by a third entity. TANTRANSCO to evacuate the Petitioner / PPRE's project. Had the Petitioner not taken proactive steps in setting up alternate arrangements, it would not have been able to complete 50 MW of the project. The Respondent is attempting to paint the petitioner's efforts towards development of the Project as its own commitment towards the Project. Further, on one hand the Respondent is contending that the completion of 50 MW of the Project is proof enough of the steps taken by the Respondent towards the completion of the Project, while on the other hand the Respondent alleges that completion of 50 MW of the Project demonstrates the lack of the Petitioner's interest towards completion of the rest of the Project.

11.27. Due to the abovementioned reasons, the Petitioner requested the 1st Respondent to extend the commissioning date and waive the liquidated damages

payable by the Petitioner by way of communication dated. 02.04.2019, which the Petitioner is rightfully entitled to. The 1st Respondent communicated through its communication dated 30.04.2019 that such extension is not feasible and that the levy of liquidated damages cannot be waived without due consideration to the fact that the procurement of funds and evacuation of power has been jeopardized by the Petitioners own actions / inactions. Therefore, the Petitioner was constrained to obtain legal remedy and approach the Hon'ble High Court of Madras by way of a writ petition, since this Hon'ble Commission was not functioning at that point of time. Thereafter, upon the direction of the Hon'ble High Court, the Petitioner approached this Hon'ble Commission by way of this DRP.

11.28. The responsibility of the Respondents to provide the evacuation facilities in a prompt, complete and timely manner is undisputed. Section 2.8 of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 states as follows:

"2.8 Role of STU

2.8.1 Section 39 of the Electricity Act, 2003, outlines that the functions of the State Transmission Utility (STU) shall be -

(1) (a) to undertake transmission of electricity through intra-state transmission system;

(b)

(c) to ensure development of an efficient, co-ordinated and economical system of intra-state transmission lines for smooth, flow of electricity from a generating station to the load centers"

Further, Clause 2(d) of the EPA reads as follows:

"2. Interfacing and Evacuation Facilities:

(d) Both Parties shall comply with the relevant provisions contained in the Indian Electricity Grid Code, Tamil Nadu Electricity Grid Code, the Electricity Act, 2003, other Code and Regulations issued by the Tamil Nadu Electricity Regulatory Commission / Central Electricity Authority (CEA) as amended from time to time;

11.29. The above clearly demonstrates the statutory and contractual obligation on the Respondents to provide evacuation facilities. In the absence of being able to assure the evacuation infrastructure, a project requiring investments of several hundreds of crores is totally unfeasible. Since there was no assurance that evacuation infrastructure will be made available in the near future the Petitioner has been unable to receive funds from its lenders. Despite the same, the Petitioner has invested its own funds and commissioned about 50 MW and has secured locations for the balance 150 MW and created the pooling infrastructure for the total project and in addition has manufactured substantial equipment and also procured equipment totally worth nearly INR 500 Crores for implementing the balance extent of the Project. The Petitioner is presently undergoing Corporate Insolvency Resolution Process which is largely attributable to the defaults and financial constraints caused by the Respondents. Despite the above stated efforts and expenses incurred by the Petitioner. Hence, the Respondents cannot be allowed to blame the Petitioner after having

caused such severe hardship and irreparable injury to the Petitioner by its inaction and breach of contract and statutory obligations.

11.30. The Respondents have conveniently ignored the provisions of the tender documents which require the Respondent to provide the Petitioner with the requisite evacuation facilities, timely payments, payment security in the form of a revolving letter of credit amongst others, and the said obligations of the 1st Respondent are not contingent upon any factor, contrary to what is being alleged by the Respondents. In this regard, reference may be made to clause 2(d) of the PPA read along with section 2.8 of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 and clause 10 of the PPA. Further, the Respondent has admitted to its responsibility of providing evacuation facilities in its response to pre-bid queries. Nowhere has it been stated that the evacuation facilities are only a consequent liability falling upon the Respondents, subsequent to the building of the pooling substation. It is submitted that for the successful generation of power and consequent completion of project, commissioning and evacuation of power are both essential elements. Without the proper evacuation facilities being in place, the Project cannot be completed.

10.31. Since the commencement of the Project until this date, despite the hurdles put forth by the Respondents, the Petitioner has undertaken all such activities to the extent that it was under the Petitioner's control towards the development of the Project. A reference may be made to the Project Report dated 04.09.2019 filed by the Petitioner before this Commission. Delays that have occurred have been owing to the inactions of the 1st Respondent which have had a domino effect on the

development of the Project. In spite of the obstacles faced by the Petitioner, the Petitioner has been able to make substantial progress in developing the Project. It is only upon evacuation infrastructure being made available can the further development of the project commence. The erection of the wind turbine generators and the unit sub-station, etc must be constructed only upon confirmation of the evacuation facilities. However, the Petitioner is committed towards completion of the Project and will, upon confirmation of the evacuation infrastructure, endeavor to commission the project in an expedient manner until and unless the 1st Respondent provides assurance of adequate evacuation facilities for the Project and further provides a revolving LC as payment security, it will be impossible for the Petitioner to persuade its lenders to provide final sanction or release of funds. The 1st Respondent must provide proper commitment to the Petitioner that it will be able to provide necessary technical feasibilities to energize the said 400kV line. The Respondents are time and again expecting the Petitioner to pump in money and efforts to honour its obligations under the EPA, however are completely overlooking their own obligations and duties. Having not completed its obligations under the EPA, the 1st Respondent cannot arm-twist the Petitioner into fulfilling only the Petitioner's obligations without the possibility of the Project fructifying.

11.32. The Respondents have, time and again, cherry-picked on provisions of the EPA and placed unsubstantiated statements before the Commission about the Petitioner's failure to abide by the provisions of the EPA but have expected this Commission and the Petitioner to overlook the responsibilities of the Respondents, particularly provisions of the evacuation infrastructure which forms an intricate part of the

commissioning of the Project. The Respondents have adopted a very unfair approach in viewing the tender document and PPA in as much as they are only selectively seeking enforcement and placing reliance on only certain provisions of the said documents which are convenient and beneficial to the Respondents while ignoring all obligations cast upon the Respondents thereunder.

11.33. With regard to obtaining financial closure, the Petitioner approached and negotiated with several project lenders for the purpose of obtaining term loan for the Project or atleast achieving financial closure. As stated earlier, the Petitioner had difficulty in obtaining any financial lending owing to the lack of payments received from the 1st Respondent for the already commissioned 50 MW. Further the 1st Respondent failed in its obligations under the EPA in opening revolving letters of credit, which further deterred lenders from providing financial support to the Petitioner. To make matters worse, due to the unavailability of the evacuation facilities and the lack of clarity on when it will be available, lenders refused to provide any credit facility for the Project to the Petitioner. However, the financial institutions have expressed their intention to provide requisite credit facilities in the form of term loan/project loan, cash and non-cash credit facilities for setting up the project provided the evacuation infrastructure is completed and payment security is provided by the 1st Respondent prior to issuance of sanction letter.

11.34. The Respondents cannot, under the guise of claiming to be a saviour of public money encashing PBG when it is not supportive of serious project developers with substantial experience and expertise such as the Petitioner,

as evidenced by the willingness of the Petitioner towards the development of the Project thus far, while also acceding to every unreasonable request/ instruction issued by the 1st Respondent. The 1st Respondent is further attempting to extract a large sum of money from the Petitioner under the pretext of construction of evacuation infrastructure, while knowing fully well that provision of evacuation infrastructure is impossible. In the present circumstances, in order to be able to make such tall claims, the Respondents must provide effective, timely and satisfactory support to wind power generators such as the Petitioner, in order to effectively generate power which will ultimately be beneficial to the general public instead of providing any such support, the Respondents place such hindrance and obstacles in the way of serious project developers, which force them to pursue litigations and thereby cause severe loss not only to such petitioners but also to the state exchequer and the general public.

11.35. The 1st Respondent is behaving in a high handed manner, attempting to dodge its statutory and contractual duties. The 1st Respondent is seeking to unjustly enrich itself, much to the prejudice of the Petitioner, by taking advantage of its own wrong-doing. The Respondent has been painting a grossly misleading picture that the project has come to halt solely due to the Petitioner, when in fact the same is wholly attributable to the Respondent alone. Despite being aware of the fact that it has not honoured its own obligations, which has been fatal to the development of the project, the Respondent has refused to extend the commissioning date. This clearly displays the arbitrary and unreasonable manner in which the 1st Respondent is behaving.

11.36. The case of the Respondents is that the commissioning date of the project is undisputed, and the Petitioner having not commissioned the Project by the commissioning date, the Respondents are entitled to terminate this Agreement and invoke the bank guarantee and levy liquidated damages. This argument is entirely flawed. While it is true that the PPA provided for commissioning date and liquidated damages, the same was subject to the Respondent completing its obligations in a timely manner. It is not for the respondents to dispute the date of commissioning when the Respondent has not honoured its contractual obligations and when in fact the commissioning is dependent upon certain crucial obligations of the Respondent, one of which being the Respondent providing adequate evacuation infrastructure and another critical aspect being that the Respondents honour their payment and payment security obligations in order for any investor or financial institution to consider this Project to be commercially viable for such investment. Therefore, the conclusion that the Respondents are trying to draw, merely based on untrue statements, that they are and have been ready to provide evacuation facilities at every stage is blatantly false.

11.37. In light of the 1st Respondent failure to fulfill its contractual and statutory obligations, the Petitioner is entitled to receive the extension of commissioning of the project and that the 1st Respondent, in good faith and due to it being the defaulting party, must have granted such extension willingly. Instead the petitioner stating arbitrarily, unreasonably and illogically that such extension is not viable since the Project was not commissioned by the commissioning date, it is at liberty to act as per the provisions of the RfS and further levy liquidated damages for the un-commissioned capacity. This is clearly against the well accepted principle of law

that a defaulting party cannot take the benefit of its default to unjustly enrich itself, especially against and to the detriment of the non-defaulting party.

11.38. The Petitioner has approached this Commission in good faith and with a genuine intention to complete the Project as contemplated under the PPA, without any hidden motives. The Petitioner apprehends that the Respondents may, maliciously and/or illegally terminate the PPA, which will hinder the Petitioners capability of completing the Project and has therefore filed the present petition.

11.39. In this background, the Petitioners approached the Respondents, based upon the direction of the Commission to arrive at an amicable settlement. However, the Respondents refuse to agree at a tariff rate greater than Rs.2.80. Such a tariff rate is wholly unviable for a project of this magnitude.

11.40. The Respondents have heavily relied on a passing remark made in the order of this Commission in M.P.No.42 of 2008, as the rationale for denying extension of time for completion of the Project, stating that this Commission has taken cognizance of the fact that wind energy generators require just three to six months to install their capacity. The Respondents have tried to use the remark made by this Commission in respect of individual wind energy generator (WEG), as also chosen to be ignorant of the fact that wind energy projects comprising of multiple WEGs in and around the year 2008 were comprised of capacity between 25 MW to 50 MW. The Respondents know full

well that they cannot apply such timelines to large projects such as the current Project which comprises of 250 MW capacity and also uses substantially larger turbines having blade length of over 80 metres which are neither readily available nor easily transportable. These projects take anywhere between 18 to 36 months depending on financial closure, manufacturing, land procurement, land approvals, TANGEDCO and AAI/MOD approvals, route preparation, road widening, road strengthening, bell mouth creation for turning, transportation, foundation during period of 42 days for each erection, safety certification, short term and long term stability tests and finally commissioning, combined with integration of pooling substation with grid substation and laying off dozens of internal and external medium voltage and high voltage lines respectively. Hence even SECI allows between 24 to 36 months for commissioning of such projects. The arguments of the Respondents relying on an order pertaining to circumstances existing 12 years ago where abundant land and evacuation facility were available falls flat on its face. The Respondents are selectively reading the order in M.P. 42 of 2008 without recognizing the obligations cast upon them to efficiently and timely provide evacuation facilities for wind power projects and to ensure prompt settlement of accounts given the seasonal nature of wind power production. Therefore, the order in M.P. 42 of 2008 has no application on this matter per se. In addition to this, the Respondent is seeking to take advantage of the purportedly accommodative attitude adopted by it at the initial stages of the Project. However, it is pertinent to mention that any and all indulgences shown by the Respondent towards the Petitioner were with ulterior motives pursuant to several difficulties and constraints being faced by them as well. The Respondents are further trying albeit poorly to show a public cause in their

encashment of the PBG that they have done nearly nothing to be entitled to any moneys from the Petitioner, rather the Respondents seem to have no business other than to announce projects and encash bank guarantees.

11.41 Despite nearly 3 years having passed since the last bid was announced by the 1st Respondent, they have not been able to announce even one further bid because they are fully aware that there will be no takers in the light of abysmal evacuation infrastructure, lack of cooperation and commitment even for trivial requests, payments and liquidity with the 1st Respondent. In this background, and at a time where the State of Tamil Nadu is requiring power, it would be prudent for any state utility to try to arrive at an amicable solution. However, Respondents are ill-advised to act in a high-handed, arbitrary and wholly whimsical manner and thereby refusing to accept their obligations under the RfS, EPA and the Grid Code or budge from their stance and guise to indulge in constructive settlement talks and thereafter for the Counsel for the Respondents to refute/deny the entire positive outcome of such settlement talks. If the Respondents are allowed by Commission to continue with their present attitude of dealing with the power producers, there will be no investments in the state in the power projects.

11.42. It appears that the Respondents are in no way interested in carrying forward the project but were only interested in encashing the PBG, after making false assurances and promises to the Petitioner and failing to deliver the same. After blatant and severe lapses in completion of its own obligations under the PPA, the Respondents have

encashed the PBG unlawfully, thereby unjustly enriching themselves of the PBG amount while also being entirely at fault and the sole defaulting party for the failure of the Project. It has always been the argument of the Respondents that the Petitioner is playing with the public money, however, the Respondents have only been floating tenders with the intention of short-changing private players such as the Petitioner, with a view to encash the PBG wilfully, in light of the fact that they are in a dominant position, leaving the private players with little to no room to survive.

11.43. The Petitioner has clearly established, by way of documentary proof, that it has been willing and ready to honour its obligations under the PPA. Without the provision of the evacuation facility, which is one of the most critical obligations of the Respondents, it is surprising to note that the Respondents are attempting to evade all liabilities and are proceeding on the footing that the Petitioner has not been committed to completion of the project. Further the Project Report filed by the Petitioner sets out in detail, with documentary evidence the various steps taken by the Petitioner towards completion of the Project.

11.44. As is evident from the above, the Petitioner has developed the Project so far as it was possible. However several critical and integral parts of the Project remain to be completed, which can be completed only pursuant to the availability of the evacuation facilities and assurance of payment security leading to financial closure and disbursement. Upon receipt of the confirmation of permanent evacuation facilities, Petitioner will be able to achieve the financial

closure, pursuant to which, the remainder of the Project will be undertaken. The Petitioner will require eighteen months to complete the Project. In addition to this eighteen month timeline, in light of the Covid-19 pandemic outbreak and the resultant lockdown for nearly three months, industries across the country have been experiencing shortage of resources and imports have been brought to a standstill. Orders placed to suppliers have been notified to be delayed by several months due to manufacturing backlog around the world. All contract labourers (including migrant labourers) from various part of the country have been displaced and restoration of labour for infrastructure projects will require some months. Hence, it is evident that there will be substantial delays in mobilizing resources, logistics and/or sourcing components required for manufacturing WTGs from other countries including the embargo on imports by the Central Government. Therefore, the Petitioner seeks for a 3 months' moratorium for the manufacturing and mobilization activities to recommence.

11.45. It is pertinent to mention that Insolvency proceedings under the Insolvency and Bankruptcy Code, 2016 has been initiated against the Petitioner during the pendency of this petition. Despite the same, the Petitioner has been showing good progress, and has been fully functional. The Petitioner even today is entirely capable of completing the Project, upon availability of evacuation services and extension of time. Therefore, the argument of the Respondents that the Petitioner is before NCLT in CIRP has no relevance in the completion of the Project by it since the Committee of Creditors and RP have provided consent and approval to proceed with the matter before this Hon'ble Tribunal in the interest of the

Petitioner.

11.46. The Petitioner has been willing to complete the Project till date and continues to be willing to do so, on the terms of the EPA agreed upon or at-least in accordance with the terms of the Settlement Memo circulated on behalf of the Petitioner, subject to approval of this Commission for extension of time sought by the Petitioner. The Petitioner has always endeavoured and placed its best efforts to commission the Project and supply the electricity as agreed upon. However, the lackadaisical and highhanded nature of the Respondents appear to indicate that the Respondents are not willing to or interested in the development or completion of the Project.

11.47. The Petitioner cannot understand how the Respondents can claim that the evacuation facilities have been ready and available for the Project, when the alleged commissioning certificate filed by the Respondents itself is completely contradictory to the facts of the case. The same may further be evidenced by any technical expert being appointed to assess the veracity of the Petitioner's averments and submit a report to the effect. Commission may also direct TANTRANSCO to file an affidavit detailing the number of units of electricity being evacuated pursuant to its alleged commissioning, if it deems fit. The Petitioner has time and again proved its ability and willingness to complete the Project in an effective and efficient manner. That being the case, it is abundantly clear that the Petitioner is entitled to obtain an extension on the commissioning date for the Project. As has been admitted to by the Respondent itself, on several occasions, that it will be an economical loss for it to procure energy from private parties at a much higher price, it is therefore

equitable and beneficial for both parties and public at large to extend the commissioning date of the Project and ensure completion of the Project. It is once again reiterated that if this Commission grants extension of time to the Petitioner, the Petitioner will be able to complete the Project based on the aforesaid terms and more particularly only if financial commitments and uninterrupted evacuation facility is made available by the Respondents.

11.48. In the event that this Commission be of the view that the Project is not viable to be completed any longer due to the delays as can be seen from the above not to be attributable to the Petitioner, TANGEDCO may be directed to terminate the PPA upon the following terms:

- (1) The Respondents be liable to reimburse the Petitioner towards all expenses and payments made by the Petitioner for the development and completion of the Project along with interest at the rate of 18% . p.a.;*
- (2) The Respondents be directed to return the amount received by it by the illegal invocation of the entire PBG along with interest at the rate of 18% p. a.; and*
- (3) The Respondents shall not be entitled to raise any claims against the Petitioner with respect to the time elapsed, termination of the PPA and/or the Project.*

11.49. The application filed by the Petitioner regarding the refund of the court fee paid (INR 25,00,000/-) may also be considered in the interest of justice which were paid under protest by the Petitioner at the time of filing the DRP. The Petitioner submits that the appropriate court fee for the matter was already paid

along with filing the application. Item No. 6(c) of the Regulations prescribes the fee for filing any interlocutory application in any main petition filed before the Commission to be INR 500 (Rupees five hundred only) for each interlocutory application filed. Item No. 7-A in section 6 the Regulations prescribes the fee for adjudication of disputes between the licensees and generating companies under Section 86(1)(f) of the Electricity Act to be 1% of the amount in dispute subject to a minimum of Rs.20,000/-.)

11.50. The Registry treated the value of the dispute to be the value of the performance bank guarantee furnished by the Petitioner. However, the crux of the dispute is not the encashment of performance bank guarantee, much less the quantum of the bank guarantee and therefore, the Registry is not entitled to calculate the court fee based on the value of the Bank Guarantee. Assuming without admitting that the Petitioner claims for a relief against the performance guarantee, such relief, if at all, is only an ancillary relief to the main relief and therefore, the payment of court fee on such ancillary relief is not warranted. Therefore, court fee levied upon the Petitioner, to the tune of INR 25,00,000/- (Indian National Rupees Twenty-Five Lakhs Only) is excessive and incorrect and ought to be returned/ refunded to the Petitioner.

12. Findings of the Commission:-

12.1. Before proceeding to deliver our findings on the issues raised by the petitioner, it is necessary to place on record that the Hon'ble Chairman of the Commission has sought to recuse himself from this matter and accordingly the

Commission in its Daily Order dated 05-09-2019 has held that the Hon'ble Chairman recused himself from hearing in future. In this regard, it is to be noted that as per regulation 12 of the TNERC-Conduct of Business Regulations, 2004, the presence of two Members is sufficient to constitute the Quorum and accordingly we proceed with the present case excluding the Hon'ble Chairperson of the Commission for the reasons stated by him. It is necessary to set out the brief history of the events leading to the filing of this petition for better appreciation of the fact of the case.

12.2. The petition has been filed to direct the respondent (TANGEDCO) to complete the evacuation facility / infrastructure as undertaken by them under the provisions of the Energy Purchase Agreement (EPA) dated 19-10-2017 and request for submission of document bearing reference No. CE/NCES/OT.No.2/2017-18 and consequently extend the commissioning date of the project for the period of delay by the respondent until completion of the same in providing evacuation facility to the petitioner. The petitioner has also filed an I.A. in I.A. No.3 of 2019 in D.R.P. No.5 of 2019 to grant an order of interim injunction restraining the respondent from invoking / encashing the Performance Bank Guarantee for an amount of Rs.20,00,000/- (Rupees Twenty Crores only) issued on behalf of the petitioner to the respondent and also from levying any liquidated damages under clause 16 (b) of the EPA dated 19-10-2017. It may be stated that the above PBG has been encashed by the respondent on 18-10-2019 and hence this I.A. has been dismissed as infructuous between on 28-01-2020.

12.3. The petitioner and the 1st Respondent executed an EPA on 19-10-2017 for establishment of 200 MW Wind Power Project (Project) at Therkumailadai Village, Ottapidaram Taluk, Tuticorin District. An addendum to the EPA dated 20-03-2019 was executed between the parties to split the EPA into 4 projects of 50 MW each in the name of 4 subsidiaries wholly owned by the petitioner incorporated for the purpose of the above said project. (Special Purpose Vehicles) The above addendum was executed at the instance of the petitioner only. The said addendum to EPA also recorded that M/s. Purushotama Perumal Renewable Energy Pvt. Ltd. ("PPRE") would undertake the commissioning of the first 50 MW on submission of Performance Bank Guarantee of Rs.5,00,00,000/- (Rupees Five Crores only). The EPA was accordingly amended to the effect that the petitioner would undertake the remaining 150 MW by itself or through its subsidiaries (i.e. SPVs.)

12.4. The petitioner submitted a Performance Bank Guarantee dated 17-10-2017 for an amount of Rs.20,00,00,000/- (Rupees Twenty Crores only) at the rate of Rs.10 lakhs per MW as per clause 14 of the RfS. The PBG was submitted as a security against commissioning of the project within 15 months from the date of the EPA. As such the project should have commissioned before 19-01-2019.

12.5. Clause 26 (b) of the RfS has provided that if the commissioning of the project is delayed beyond 19-01-2019, the 1st Respondent is entitled to encash the PBG on the day basis proportionate to the capacity not commissioned and in case the project is delayed beyond five (5) months thereafter (19-01-2019), the respondent is entitled to encash 100% of PBG. In addition to such encashment,

the petitioner is also liable to pay a sum of Rs.10,000/- (Rupees Ten Thousand only) per MW per day of delay as liquidated damage for the delay in such remaining capacity which is not commissioned. According to clause 26 (b) of the EPA, the maximum time line allowed for commissioning of the full project capacity with encashment of PBG and payment of liquidated damages shall be 10 (ten) months from the scheduled date of commissioning. In other words, the project could commission with encashment of PBG and on payment of liquidated damages on or before 19-11-2019. In case commissioning of the project is delayed beyond ten months from the date of schedule date of commissioning, the EPA capacity shall stand reduced / amended to the project capacity commissioned and the EPA for the balance capacity shall stand terminated. If the project is not at all commissioned beyond 10 months from the scheduled date of commissioning, the EPA will be terminated in its entirety by the 1st respondent. This has been precisely the contractual terms involved in this case.

12.6. We have heard the submissions made by Thiru N.L. Rajah learned Senior Advocate appearing for the petitioner and Thiru S.R. Rajagopal learned Additional Advocate General appearing for the respondents. The learned Senior Advocate appearing for the petitioner ultimately argued that approximate cost of production of 1 MW of power is 6 crores and no lender will come forward to invest a huge amount running to several hundreds of crores in the absence of evacuation facilities being guaranteed by the 1st respondent which is an obligation imposed on the respondent under the EPA. He would further submit that EPA consists of bundle of obligations to be performed by both parties and where one of the parties failed to fulfil his part

of his obligation, the other party would be entitled to relief under equity. The petitioner's counsel has also submitted that the respondent has failed to create Letter of Credit (LoC) and due to this the lenders of the project has hesitated to come forward to invest for the project and hence the petitioner is unable to achieve the financial closure. He has also submitted that the commissioning of 50 MW of the project itself shows the willingness on the part of the petitioner to complete project. The learned counsel for the petitioner has further submitted that the Commission as a Regulator should look for the health of the Regime and by granting extension of time for commissioning of the project, no prejudice would be caused.

12.7. Per contra the learned Additional Advocate appearing for the respondent strongly opposed the contention of the petitioner on two counts. Firstly, on the question of maintainability, he has submitted that the petitioner company is now before National Company Law Tribunal (NCLT) and Insolvency Resolution Professional (IRP) has also been appointed. Therefore, the petitioner company cannot continue the proceedings before this Commission since the IRP alone is legally entitled to represent the Board of the Petitioner Company. He has also contended that in the backdrop of the changed circumstances, it is not clear whether the IRP is going to continue this proceedings and whether he would be interested to continue the project in the event of commission deciding in his favour. It is also his contention that at the instance of the petitioner only, the addendum to EPA has been executed in the month of March 2018 whereby four Special Purpose Vehicles have been established to undertake the project of 50 MW each. Those

four SPVs are not impleaded as parties to their proceedings and hence he has submitted that this petition is not maintainable.

12.8. Secondly, on the question of merit of the case, the learned Additional Advocate General has submitted the very splitting of the 200 MW project into four project of 50 MW each (1 x 50 MW) itself shows the inability of the petitioner to move forward with the project in its entirety. On the other hand, the interfacing of 50 MW already commissioned project with Thennampalli S.S for evacuation instead of Rasipuram S.S. which was still under construction would prove that the respondent is ready and willing to perform his obligations under the EPA. He has also pointed out that the petitioner has not at all done anything to establish to 230 KV Pooling Sub-station to connect the WEGs to which the wind energy generated will be transmitted. The construction of Pooling Sub-Station is independent and it does not depend on the construction of Bay for evacuation by the respondent. He has also submitted that there is nothing in the terms of EPA providing for the simultaneous construction of Pooling Sub-station by the petitioner and the construction of Bay by the respondent and the respondent is always ready to evacuate the power in the event of commissioning of the project.

12.9. With regard to non-opening of Letter of Credit in favour of the petitioner by the respondent, the learned Additional Advocate General has submitted that the said provision of opening of LoC relates to billing and settlement and as such it would be a relevant factor after establishment of the project and supply of power to the respondent commences. The learned Additional Advocate General has

therefore, whittled down the contention of the petitioner in this regard. The learned Additional Advocate General has submitted that the petitioner has never adhered the time lines specified in the EPA and although the concept of “Ready and Willingness” is a concept under Specific Relief Act, the same can also be imported in this case also and going by the said principle, the petitioner has not proved that he is ready and willing to perform his part of obligations. For the above reasons, he has submitted that the petitioner is not entitled to any relief and the respondent is entitled to assert his right under the EPA including claim for liquidated damages.

12.10. We have carefully considered the submissions of both side. We see that there is a legal force in the submission of the learned Additional Advocate General. The petitioner company is already before NCLT, New Delhi and it has been informed to us that an IRP has been appointed. At this stage, the petition cannot be maintained before this Commission by the petitioner company since the decision to proceed with this proceedings could be taken only by the IRP. In addition to the above, the four Special Purpose Vehicle (SPVs) created to execute the project have not been included as a party to this proceedings. In view of the above, our findings on the maintainability, we are not inclined to examine the other issues raised by both parties on merit of the case. Under these circumstances, no relief could be granted to the petitioner.

12.11. As regards, the refund of court fees sought by the petitioner to an extent of Rs.20,00,000/- (Rupees Twenty Lakhs only) in I.A. No.3 of 2019 in the D.R.P. No. 5 of 2019, it is observed that the amount of Performance Bank Guarantee (PBG) falls

within the meaning of “amount in dispute” as recurring in regulation 6 (7A) of the TNERC–Fees and Fines Regulations, 2004 and hence Registry was right in insisting the same. Hence, the refund cannot be allowed. Accordingly I.A. No.3 of 2019 filed by the petitioner is dismissed.

The petition is dismissed and in the circumstances, there will be no order as to costs.

(Sd.....)
(K.Venkatasamy)
Member (Legal)

(Sd.....)
(Dr.T.PrabhakaraRao)
Member

//True Copy//

Secretary
Tamil Nadu Electricity
Regulatory Commission