

BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION AT PANCHKULA

Case No. HERC/Petition No. 64 of 2023

Date of Hearing : 20.02.2025
Date of Order : 09.04.2025

In the Matter of

Petition under Section 86(1)(b) of the Electricity Act, 2003 read with Clause 6.8.3 of PSA filed by Haryana Power Purchase Centre seeking to determine compensation for shortfall in supply of minimum energy for Financial Year 2022-2023 under 250 MW Wind Power PSA dated 13.12.2017 executed with SECI in accordance with the Guidelines for Transparent Bidding Process for Implementation of Scheme for setting up of 1000 MW Inter-State Transmission System-connected Wind Power Projects (Tranche-II) dated 04.05.2017 issued by the Ministry of New & Renewable Energy (MNRE).

Petitioner

Haryana Power Purchase Centre, Panchkula (HPPC)

Respondents

1. M/s. Solar Energy Corporation of India Limited (SECI)
2. M/s. Nani Virani Wind Energy Pvt. Ltd.

Present on behalf of the Petitioner

1. Ms. Sonia Madan, Advocate

Present on behalf of the Respondents

1. Ms. Shikha Ohri and Sh. Kartik Sharma, Advocates for respondent no. 1
2. Sh. Amit Jhanji, Sr. Advocate for respondent no. 2
3. Ms. Eliza Gupta, Sh. Mayank Bughani and Sh. Rajat Khanna, Advocates for respondent no. 2

Quorum

Shri Nand Lal Sharma
Shri Mukesh Garg

Chairman
Member

ORDER

Brief Background of the case

1. The present petition has been filed by HPPC, seeking determination of compensation for shortfall in supply of minimum energy for Financial Year 2022-2023 under 250 MW Wind Power PSA dated 13.12.2017 executed with SECI.
2. Petitioner's submissions are as under:-
 - 2.1 That Solar Energy Corporation of India Limited (hereinafter referred to as 'Respondent No.1/SECI'), under the administrative control of the Ministry of New and Renewable Energy (MNRE) is the nodal agency for implementation of MNRE Scheme for setting up

of 1000 MW Inter-State Transmission System (hereinafter referred to as 'ISTS') connected Wind Power Projects for developing grid connected wind power capacity.

2.2 That M/s Nani Virani Wind Energy Private Limited (hereinafter referred to as 'Wind Power Developer/Respondent No.2') is engaged in the business of generation of power and is desirous of setting up a 50 MW Wind Power Project located at Tehsil, Lakhpat & Nakhatrana, District Kutch in the State of Gujarat (hereinafter referred to as 'Project').

2.3 That the issue involved in the present case is with regard to non-supply of contracted energy units in terms of PPA and PSA executed between the parties. In terms of Clause 6.8.3 of PSA, this Hon'ble Commission is empowered to decide the rate for shortfall units which shall be paid to the Petitioner as compensation by the Respondents.

2.4 That the facts and events in the background are as under: -

- a. On 04.05.2017, Ministry of New and Renewable Energy (MNRE) issued Guidelines for transparent bidding process for implementation of Scheme for setting up of 1000 MW Wind Power Project connected to ISTS.
- b. Respondent No. 1 invited proposals for procurement of 1000 MW Wind Power or the total capacity of projects selected under the provisions of RFS (SECI/C&P/WPD/1000MW/T2/RFS/05/2017) dated 31.05.2017 on a long term basis i.e. for a period of 25 years.
- c. Respondent No.1 (SECI), as an intermediary trader, entered into 4 nos. Power Purchase Agreements (PPAs) with the below-mentioned Wind Power Developers for the procurement of a cumulative capacity of 350 MW wind power and selling the same to buying utilities on back to back basis. The details of the PPAs are as under -

Sr. No.	Project Developers	Project Capacity (in MW)	Haryana's Share	Individual Tariff (Rs/kWh) approved by CERC
1	M/s Orange Sironj Wind Power Ltd.	200	100	2.64
2	M/s Inox Wind Infrastructure Services Ltd (SPV - M/s Haroda Wind Energy Pvt Ltd.)	50	50	2.65
3	M/s Inox Wind Infrastructure Services Ltd (SPV - M/s Khatiyu Wind Energy Pvt Ltd.)	50	50	2.65
4	M/s Inox Wind Infrastructure Services Ltd (SPV - M/s Nani Virani Wind Energy Pvt Ltd)	50	50	2.65
Total		350	250	

- d. M/s Inox Wind Infrastructure Services Limited was declared as a successful bidder against RFS issued by Respondent No. 1. For the purpose of implementation of the aforesaid MNRE scheme, M/s Inox Wind Infrastructure Services Limited had formed a project named 'M/s Nani Virani Wind Energy Private Limited' (hereinafter referred to as 'Respondent No.2') for development of Wind Power Project, generation and sale of wind power under the above scheme.

- e. Thereafter, the Power Sale Agreement (hereinafter referred to as 'PSA') was executed on 13.12.2017 between SECI and HPPC for sale of 250 MW wind power on long term basis for fulfilment of non-solar RPO targets as mandated by this Hon'ble Commission. Subsequent to which, Power Purchase Agreement (hereinafter referred to as 'PPA') was executed on 27.12.2017 between M/s Nani Virani Wind Energy Private Limited (Wind Power Developer) and Solar Energy Corporation of India Ltd (SECI) to sell 50 MW of Wind Power to HPPC for 25 years from the COD of the Project.
- f. PPA and PSA are back-to-back agreement and therefore, the terms of the PPA and PSA correspond with each other. The terms of PSA provides for the minimum generation that the Respondent no. 2 had to maintain during a Contract Year. The 'Contract Year' has been defined under Article-1 of PSA, as under –
- “Contract Year” Shall mean the period beginning from the Effective date and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31 provided that first contract year shall start from Commercial Operation date of the Project and the last Contract year of this Agreement shall end on the last day of the term of this Agreement.*
- Article -1 of the PPA however, defines the 'Contract Year' as under –
- “Contract Year” shall mean the period beginning from the Effective Date and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31 provided that:*
- (i) in the financial year in which the Scheduled Commissioning Date would occur, the Contract Year end on the date immediately before the Scheduled Commissioning Date and a new Contract Year shall commence once again from the Scheduled Commissioning Date and end on the immediately succeeding March 31, and thereafter each period of twelve (12) months commencing on April 1 and ending on March 31, and*
- (ii) provided further that the last Contract Year of this Agreement shall end on the last day of the Term of this Agreement.”*
- g. The tenure of the PPA has to be counted from the COD of the project. Article-1 of the PSA defines 'Commercial Operation Date' (COD) and 'Commissioning' as under –
- “Commercial Operation Date” - Shall mean the actual date of commercial operation/commissioning of the project as declared by the State Nodal Agency (SNA)/Committee/ individual/ any other entity authorized by SECI. COD will be*

declared only when the project developer has commissioned at least 50 MW capacity or 50% of the allotted Project Capacity whichever is higher. PPA tenure will be counted from the COD irrespective of the date of commissioning of the balance capacity.

“Commissioning” or “Project Commissioning” - The Project will be considered if all equipment as per rated Project Capacity have been installed and energy has flown into grid, in line with the Commissioning procedure defined in the Guidelines/ PPA

- h. The Respondent No.2 started scheduling power from its wind project in parts as tabulated hereunder -

Sr No.	Part Capacity Commissioned (in MW)	COD	Commissioning date
1.	10	12.12.2021	12.09.2021
2.	10		23.03.2022
3.	10		13.05.2022
Total	30		

- i. The Article 4.4.1 of the PPA which corresponds to Article 6.8.3 of PSA contains specific provision specifying the Right of the Buying Entity to the Contracted energy generated from the project. In terms of Article 6.8.3 of PSA dated 13.12.2017, Respondent No. 2 was obligated to supply minimum quantum of 7,26,28,807 units corresponding to 30 MW capacity in the first Contract year. The provision of Article 6.8.3 of PSA, which is *para-materia* to Article 4.4.1 of PPA is reproduced herein below for ready reference-

"The WPD will declare the CUF of the Project and will be allowed to revise the same once within first year of COD. HPPC, in any Contract Year, shall not be obliged to purchase any additional energy from the SECI/WPD beyond 911.92 Million kWh (MU). If for any Contract Year, it is found that the WPD has not been able to generate minimum energy of 683.94 Million kWh (MU) WPD shall be liable to pay only such compensation at the rate decided by the State Electricity Regulatory Commission on HPPC for such shortfall in meeting of the POs and shall duly pay such compensation to SECI to enable SECI to remit the amount to HPPC. This compensation shall be proportional to the amount of shortfall in wind energy during the Contract Year. WPD shall maintain generation so as to achieve CUF not less than 90% of their declared CUF value and not more than 120% of their declared CUF value during PPA duration of 25 years. The lower limit will, however be relaxable by SECI to the extent of grid non availability for evacuation which is beyond the control of the developer. The CUF will be calculated every year from 1st April of the year to 31st March next year."

(Emphasis Supplied)

Considering the foregoing provisions, the first Contract year for the instant project started w.e.f. 13.05.2022 and ended on 31.03.2023.

- j. The Ministry of New and Renewable Energy vide letter dated 24.01.2023 observed that *"...the 30 MW capacity which has already been commissioned in line with the MNRE's letters dated 03.06.2021 and 13.01.2022 shall be accepted and balance capacity of 20 MW shall be cancelled by the SECI on account of delay beyond the outer limit, as per the provision of wind bidding guidelines issued by MNRE vide its letter dated 04.05.2017. Further, the above acceptance of commissioned capacity as well as cancelled capacity shall be subject to the applicable penalties, as per provisions of Power Purchase Agreement."* Accordingly, the Respondent No.1 vide letter dated 20.02.2023 terminated the balance capacity of 20 MW in compliance with MNRE direction, therefore the total project capacity of Respondent No.2 was restricted to 30 MW.
 - k. Respondent no. 2 failed to supply the minimum energy specified in Article 6.8.3. The Respondent No.2 managed to supply only 97,31,463 units as against 7,26,28.807 units in the first Contract year. The shortfall in supply of energy on pro-rata basis for the period 13.05.2022 to 31.03.2023 comes out to 6,28,97,344 units.
 - l. The Respondent no. 1 vide email dated 15.07.2022 intimated Respondent no. 2 that the scheduled generation from the installed capacity of 30 MW of the project was nil for three consecutive days i.e. 13.07.2022 to 15.07.2022. In view of the same, justification was sought for nil generation.
 - m. The Respondent no. 2 through their email dated 16.07.2022 intimated that 220 KV transmission tower had collapsed on 12.07.2022 on account of heavy rains leading to tripping of line. The Plant remained under shutdown until 06.12.2022. The resumption of operation of the plant was intimated by the Respondent no. 2 vide letter dated 06.12.2022.
- 2.5 That Respondent no. 2 has failed to supply the minimum energy specified in Article 6.8.3 which necessitates payment of shortfall compensation to be remitted to the petitioner. As stated above, the Respondent No.2 supplied 97,31,463 units as against 7,26,28.807 units in the first Contract year. The shortfall in supply of energy on pro-rata basis for the period 13.05.2022 to 31.03.2023 comes out to 6,28,97,344 units.
- 2.6 That Article 6.8.3 of the PSA (reproduced above) empowers the Hon'ble Commission to determine the rate for the shortfall units, which has to be remitted to the Petitioner by the Respondent no. 2 through Respondent no. 1. The Petitioner therefore prays the

determination of compensation and direction to the Respondent no. 1 to remit the same to the Petitioner in terms of PSA.

2.7 That the following prayer has been made:-

- a) Determine the rate to be applied to the shortfall units in terms of Article 6.8.3 of PSA for computation of compensation payable by the Respondent no. 1 to the Petitioner;
- b) Direct the Respondents to remit the computation assessed by this Hon'ble Commission to the Petitioner; and
- c) Pass any other order/direction, as deem fit, in the facts and circumstances of the instant case.

Proceedings in the Case

3. The case was initially heard on 05.01.2024, wherein the respondent no. 1 (SECI), pleaded to grant some time to file reply to the petition filed by HPPC and reconcile the energy averred therein.

4. **SECI's reply:**

In compliance of the order of the Commission dated 05.01.2024, SECI filed its reply, submitting as under:-

- 4.1 That on 31.05.2017, SECI issued the Request for Selection Document for selection of Wind Power Developers for setting up of 1000 MW ISTS connected Wind Power Projects. In pursuance of the competitive bidding process, SECI selected the Wind Power Developers for establishing the Wind Power Projects and for supplying Wind power to enable SECI to make available such power to the Buying Utilities/Distribution Companies.
- 4.2 That M/s Inox Wind Infrastructure Services Limited was declared as one of the successful bidder. For the purpose of implementation of the 50 MW project, M/s Inox Wind Infrastructure Services Limited formed a SPV named 'M/s Nani Virani Wind Energy Private Limited' (Respondent No. 2) for development of 50 MW Wind Power Project in the State of Gujarat.
- 4.3 That a Power Sale Agreement (PSA) was executed on 13.12.2017 between SECI and HPPC for sale of 250 MW wind power on long term basis for fulfilment of non-solar RPO targets. Subsequent to which, a Power Purchase Agreement (PPA) was executed on 27.12.2017 between Respondent No. 2 and SECI to sell 50 MW of Wind Power to HPPC.
- 4.4 That the Scheduled Commissioning Date of the project was 03.05.2019, which was finally revised as 12.12.2021 on account of various reasons and in accordance with the

memorandums issued by MNRE. In this regard, the copies of letters dated 08.09.2020, 11.09.2020, 03.09.2021, 15.07.2022 and 08.07.2022 sent from SECI to Respondent No. 2 and Petitioner are attached.

4.5 That respondent No. 2 has commissioned 30 MW capacity in a phased manner on 03.09.2021 (10 MW), 22.03.2022 (10 MW) and 12.05.2022 (10 MW) and is supplying power to HPPC.

4.6 That the scheduled generation from the project remained zero since 13.07.2022. Accordingly, SECI by an email dated 15.07.2022 sought justification from respondent No. 2 for no generation on 13.07.2022, 14.07.2022 and 15.07.2022 from installed capacity of 30 MW.

4.7 That respondent No. 2, vide an email dated 16.07.2022 intimated as under: -

"With reference to your trailing mail of 15.07.22 please note that the plant was not under scheduled shutdown or under maintenance. Torrential rains in the last few days at site created a flood like situation in the site consequent to which a 220 KV Transmission tower from our PSS to Bhuj Pool I collapsed on 12.07.22. This resulted in tripping of the line and the complete plant is under shutdown since then. A few photographs of the site are attached.

Please treat this as our notice of Force Majeure under the circumstances.

Our concerned teams as well as the Insurance Surveyors are assessing the damage and we hope to restore the line and Generation in 2 weeks time. We will keep you informed of the developments"

4.8 That the petitioner, vide an email dated 26.08.2022, again sought reasons from SECI for scheduling of no power from the wind power project of M/s Inox Wind Infrastructure Services Limited since a week. SECI again vide an e-mail dated 26.08.2022 sought submissions from respondent No. 2 for zero scheduled generation along with documentary evidence.

4.9 That the respondent No. 2, vide e-mail dated 26.08.2022, intimated as under:

"With reference to your trailing mail, note that the plant was not under scheduled shutdown or under maintenance. Torrential rains at site created a flood like situation in the site consequent to which a 220 KV Transmission tower from our PSS to Bhuj Pool I collapsed on 12.07.22. This resulted in tripping of the line and the complete plant is under shutdown since then.

The same was also intimated to SECI via email dated 16.07.2022. The mail dated 16.07.022 is attached herewith.

Our concerned teams are working to restore the line and we expect restoration by end of August 22 or latest 1st week of September.

We will keep you informed of the developments.”

- 4.10 That the respondent No. 2, vide its letter no. NV/SECI T II/2022-23/09/05 dated 03.09.2022, sought extension in SCOD on account of heavy rains in the project site and intimated that the restoration of EHV transmission line tower is expected in the first week of September 2022.
- 4.11 That the respondent No. 2, vide its letter dated 06.12.2022, intimated to SECI that the event of force majeure has now ceased and the 220 kV tower and line has been restored in the early hours of 06.12.2022.
- 4.12 That SECI, vide its letter dated 20.02.2023, intimated the respondent no. 2, as under:-

“

This has reference to your request for grant of time extension to Scheduled Commissioning Date (SCD) for 1x50 MW ISTS- connected Wind Power Project being executed by M/s Nani Virani Wind Energy Pvt Ltd (NVWEPL) under SECI Wind Tranche- 11 (Project IDs: WPD-ISTS-T2-IWISL-P4-50GJ).

In this regard, it is to inform that SECI has reviewed the grounds for extension provided by M/s NVWEPL in its letters referred above and made following observations:

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b) Heavy Rainfall - Article 11 of the PPA contains specific events which can only be considered as Force Majeure. Article 11.3.1 of the PPA uses the word 'means' while enumerating the events or circumstances or combination of events stated therein as amounting to Force Majeure. It is a settled law that the use of the word 'means' implies that the definition is restrictive and not exhaustive and no other meaning can be assigned to the expression than is stated in the definition. Article no. 11.3.1(a) of the PPA, which states "Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado.

M/s NVWEPL has not provided any notification issued by the competent state/central authority / agency (as applicable) for declaration of flood event in the region.

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In view of above facts, it is to inform that in case of 50 MW ISTS-connected Wind Power Projects in Gujarat (under Tranche II) awarded to M/s Inox Green Energy Services Limited and executed through SPV named M/s Nani Virani Wind Energy Private Limited, no time extension to Scheduled Commissioning Date can be granted on account of delay in issuance of No Objection Certificate (NoC) by Ministry of Defence (MoD), GoI or heavy rainfall.”

4.13 That, the request of Respondent No. 2 for extension of SCD on account of heavy rainfall as a 'force majeure event' was not considered by SECI. SECI vide a letter dated 22.02.2023 clarified the date of signing of letter dated 20.02.2023.

4.14 That Article 4.4 of the PPA (50MW) signed between SECI and Respondent No. 2 provides as under: -

"4.4 Right to Contracted Capacity & Energy

4.4.1 The Developer will declare the CUF of the Project and will be allowed to revise the same once within first year of COD. Buyer, in any Contract Year, shall not be obliged to purchase any additional energy from the WPD beyond 178.704 Million kWh (MU). If for any Contract Year, it is found that the WPD has not been able to generate minimum energy of 134.028 Million kWh (MU), WPD shall be liable to pay the compensation provided in the PSA as payable to Buying Entity (ies) by Buyer to enable Buyer to remit the amount to Buying Entity(ies). This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be equal to the compensation payable by the Buying Entity(ies) towards non-meeting of their RPOs. WPD shall maintain generation so as to achieve CUF not less than 90% of their declared CUF value and not more than 120% of their declared CUF value during PPA duration of 25 years. The lower limit will, however be relaxable by Buyer to the extent of grid non availability for evacuation which is beyond the control of the developer. The CUF will be calculated every year from 1st April of the year to 31st March next year.

.....

4.4.3 The compensation as per Article 4.4.1 shall be applied to the amount of shortfall in generation during the year. However, this compensation shall not be applicable in events of Force Majeure identified under Buyer-WPD PPA affecting supply of wind power by WPD."

4.15 That Article 6.8.3, 6.8.5 and Schedule 1 of the PSA (250MW) signed between SECI and HPPC provides as under:-

"6.8.3 The WPD will declare the CUF of the Project and will be allowed to revise the same once within first year of COD. HPPC, in any Contract Year, shall not be obliged to purchase any additional energy from the SECI/WPD beyond 911.92 Million kWh (MU). If for any Contract Year, it is found that the WPD has not been able to generate minimum energy of 683.94 Million kWh (MU) WPD shall be liable to pay only such compensation at the rate decided by the State Electricity Regulatory Commission on HPPC for such shortfall in meeting of the RPOs and shall duly pay such compensation to SECI to enable SECI to remit the amount to HPPC. This compensation shall be proportional to the amount of shortfall in wind energy during the Contract Year.

WPD shall maintain generation so as to achieve CUF not less than 90% of their declared CUF value and not more than 120% of their declared CUF value during PPA duration of 25 years. The lower limit will, however be relaxable by SECI to the extent of grid non availability for evacuation which is beyond the control of the developer. The CUF will be calculated every year from 1st April of the year to 31st March next year.

...

6.8.5 The compensation as per Article 6.8.3 shall be applied to the amount of shortfall in generation during the year. However, this compensation shall not be applicable in events of Force Majeure identified under this Agreement affecting supply of wind power by SECI/WPD.

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SCHEDULE 1: LIST OF LOAs ISSUED TO WPDs

Wind Power Developer (WPD)	Project Capacity	CUF%			Energy			Tariff (Rs/kWh)
		Declared	Min. (-90%)	Max (+120%)	Declared	Min. (-90%)	Max (+120%)	
Adani Green Energy (MP) Ltd.	50	36	32.4	43.2	157.68	141.912	189.216	2.65
Green Infra Wind Energy Ltd.	250	36	32.4	43.2	788.4	709.56	946.08	2.65
Innox Wind Infrastructure Services Ltd. - 1	50	34	30.6	40.8	148.92	134.028	178.704	2.65
Innox Wind Infrastructure Services Ltd.-2	50	34	30.6	40.8	148.92	134.028	178.704	2.65
Innox Wind Infrastructure Services Ltd.-3	50	34	30.6	40.8	148.92	134.028	178.704	2.65
Innox Wind Infrastructure Services Ltd.-4	50	34	30.6	40.8	148.92	134.028	178.704	2.65
Orange Sironj Wind Power (P) Ltd.	200	34.5	31.05	41.4	604.44	543.996	725.328	2.64
ReNew Power Ventures (P) Ltd.	250	34	30.6	40.8	744.6	670.14	893.52	2.64

”

- 4.16 That in terms of the aforesaid clauses, if for any Contract Year, it is found that the WPD has not been able to generate minimum energy of 134.028 million kWh (MU) [as against 50MW], WPD shall be liable to pay compensation at the rate decided by the State Electricity Regulatory Commission on HPPC for such shortfall in meeting of the RPOs to SECI, to enable SECI to remit the amount to HPPC. This compensation shall be proportional to the amount of shortfall in wind energy during the Contract Year. The Term “Contract Year” has been defined in the PSA and the PPA as under:
PSA (250MW) signed between SECI and HPPC:

“Contract Year” shall mean the period beginning from the Effective Date and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31 provided that first Contract Year shall start from Commercial Operation Date of the Project and the last Contract Year of this Agreement shall end on the last day of the Term of this Agreement.”

PPA (50MW) signed between SECI and Respondent No. 2:

“Contract Year” shall mean the period beginning from the Effective Date and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31 provided that:

- (i) In the financial year in which the Scheduled Commissioning Date would occur, the Contract Year shall end on the date immediately before the Scheduled Commissioning Date and a new Contract Year shall commence once again from the Scheduled Commissioning Date and end on immediately succeeding March, 31 and thereafter each period of twelve (12) months commencing on April 1 and ending on March 31, and*
- (ii) Provided further that the last Contract Year of this Agreement shall end on the last day of the Term of this Agreement”.*

- 4.17 That in view of the aforementioned, the minimum energy obligations to HPPC to the extent of 50 MW capacity mapped from the PPA with Respondent No. 2 shall be applicable as per Article 4.4.1 of the PPA on back to back basis to HPPC under the PSA. Further, minimum supply obligations as specified in Article 4.4.1 of the PPA for the Contract Year shall be considered on pro- rata basis for the project capacity commissioned (30 MW) under the PPA and from the COD of the project (13.05.2022).
- 4.18 That SECI has been raising regular invoices to HPPC as per Provisional/Final Regional Accounts (REA) published by Western Regional Power Committee (WRPC) and has supplied total energy of 1,22,14,407.5 kWh from the project of Respondent No. 2, during the period of 13.05.2022 to 31.03.2023.
- 4.19 That the Wind Power Developer is obligated to supply minimum energy of 134.028 Million kWh (MU) for a year as per Article 4.4.1 of the PPA [as against 50MW capacity]. In the current scenario for FY 2022-23, the minimum supply obligations as specified in Article 4.4.1 of the PPA for the Contract Year shall be considered on a pro-rata basis for the project capacity commissioned (30 MW) under the PPA and from the COD of the project (13.05.2022).
- 4.20 That it is denied that respondent No. 2 has managed to supply only 97,31,463 units as against 7,26,28,807 units calculated on pro-rata basis in the first Contract Year. It is

further denied that the shortfall in supply of energy for the period 13.05.2022 to 31.03.2023 is 6,28,97,344 units. SECI has supplied total energy of 1,22,14,407.5 kWh from the project of Respondent No. 2, during the period of 13.05.2022 to 31.03.2023. This is clearly demonstrated by the invoices raised by SECI upon HPPC.

- 4.21 That SECI in its capacity as an intermediary seller has been following up the issue of shortfall in generation with the developer diligently. Accordingly, the amount of compensation as may be decided by this Hon'ble Commission after considering shortfall in meeting of the RPOs, ought to be paid by Respondent No. 2 to SECI to enable SECI to remit the amount to the Petitioner.

5. **Additional affidavit of HPPC dated 10.04.2024:**

- 5.1 That in the petition, there has been an inadvertent error in mentioning the energy supplied by the Respondent no. 2 during FY 2022-2023. Consequently, the shortfall computed is also incorrectly mentioned. The actual energy supplied by the Respondent no. 2 is 12214408 kWh, the month-wise details of which are as under –

Period	Energy supplied by M/s Nani Virani (in kWh)
13-05-2022 to 31.05.2022	17,07,065
June, 2022	20,31,840
July, 2022	4,17,815
August, 2022	0
September, 2022	0
October, 2022	0
November, 2022	0
December, 2022	4,27,475
January, 2023	26,57,010
February, 2023	24,21,680
March, 2023	25,51,522
Total	1,22,14,408

- 5.2 In view of the correction in the figure of energy supplied by the Respondent no. 2 during FY 2022-2023, the shortfall computation has to be revised as under :-

Particulars	Energy (in units)
Minimum Mus to be provided as per SECI-HPPC PSA (corresponding to 250 MW)	68,39,40,000
Minimum Mus to be provided as per SECI-HPPC PSA (corresponding to 50 MW)	13,67,88,000
Minimum Mus to be provided as per SECI-HPPC PSA (corresponding to 30 MW)	8,20,72,800
Minimum Mus to be provided as per SECI-HPPC PSA (30 MW & Contract Year)	7,26,28,807
Energy Supplied by M/s Nani Virani in its first Contract year (i.e. 13.05.22 to 31.03.23)	1,22,14,408
Shortfall in supply of energy	6,04,14,399

6. During the hearing held on 15.05.2024, the respondent no. 2 (M/s. Nani Virani Wind Energy Pvt. Ltd.), was granted time to file its reply.

7. Reply of M/s. Nani Virani Wind Energy Pvt. Ltd. (R-2) dated 23.05.2024:

- 7.1 That the compensation contemplated under the relied upon clause, i.e. Clause 6.8.3, is not payable in the present case owing to existence of Force Majeure events at the site disrupting Wind Power generation for over 5 months (12.07.2022 till 06.12.2022).
- 7.2 That during the said period 12.07.2022 till 06.12.2022, the 220 KV Transmission Tower had collapsed on account of act of God , i.e. heavy Torrential rains (caused by low pressure) which had created flood like situation, leading to tripping of line and the Wind Power Plant of the answering Respondent had remained under shutdown till 06.12.2022. Pertinently, the said Force Majeure event was widely reported in the News Articles and even formed part of the Press Release dated 12.07.2022 issued by Indian Meteorological Department.
- 7.3 That the existence of Force Majeure Event, i.e. heavy Torrential rains which had created flood like situation, and had resulted in a 220 KV Transmission Tower from answering Respondent's PSS to Bhuj Pool I to collapse, thereby adversely effecting supply of electricity, was duly notified to Respondent No.1 as well as the Petitioner by the answering Respondent vide communications dated 15.07.2022, 16.07.2022, 26.08.2022, 03.09.2022, 12.09.2022, 04.10.2022, 10.10.2022, 09.11.2022, 15.11.2022, 28.11.2022 and 06.12.2022.
- 7.4 That the existence of the Force Majeure event was never disputed by either the Petitioner or the Respondent No.1.
- 7.5 That the Petitioner has repeatedly made reference to Article 6.8.3 of the Power Sale Agreement dated 13.12.2017 to claim compensation for alleged shortfall in supply of minimum power prescribed therein, the Petitioner has deliberately suppressed from this Hon'ble Commission Article 6.8.5 of the very same Power Sale Agreement dated 13.12.2017 (*Page 33 of the Petition*) which reads as under;
- "6.8.5 The compensation as per Article 6.8.3 shall be applied to the amount of shortfall in generation during the year. However, this compensation shall not be applicable in events of Force Majeure identified under this Agreement affecting supply of wind power by SECI/WPD."*
- 7.6 That "Force Majeure" has been identified under the Power Sale Agreement dated 13.12.2017 in Article 7.3 which inter alia covers any act of God resulting in evacuation of power being disrupted from the Delivery points, as well as any event of force majeure identified under the Power Purchase Agreement entered between the Respondents. The relevant portion of the said Article 7.3 of the Power Sale Agreement (*Page 35 of the Petition*) is being reproduced hereunder for ready reference:

*“7.3.1 A **“Force Majeure”** means any event or circumstance or combination of events and circumstances as stated below that wholly or partly prevents or unavoidably delays an Affected party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care in performing its obligations:*

- a) **Act of God**, including, but not limited to lightning, drought, fire and explosion, earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, **resulting in evacuation of power being disrupted from the Delivery Points**; or*
- b) ...*
- c) ...*
- d) ...*
- e) An event of force majeure **identified under SECI-WPD PPA** thereby affecting supply of power by WPD.”*

7.7 That Article 7.7 (Page 37 of the Petition) of the Power Sale Agreement dated 13.12.2017, inter alia provides for relief available for a Force Majeure event as under;

“7.7.1 Subject to this Article 7:

- (a) No party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;*
- (b) Every party shall be entitled to claim relief in relation to a Force Majeure event in regard to its obligations as specified under this Agreement;*
- (c)*
- (d) Provided that no payments shall be made by either Party affected by a Force Majeure Event for the period of such event on account of its inability to perform its obligations due to such Force Majeure Event.”*

7.8 That though the Petitioner places reliance in paragraph 6(i) of the above titled Petition on Article 4.4.1 of the Power Purchase Agreement dated 27.12.2017, it has deliberately suppressed Article 4.4.3 of the Power Purchase Agreement dated 27.12.2017 (Page 69 of the Petition) which reads as under;

*“4.4.3 The compensation as per Article 4.4.1 shall be applied to the amount of shortfall in generation during the year. **However, this compensation shall not be applicable***

in events of Force Majeure identified under Buyer-WPD PPA affecting supply of Wind power by WPD.”

7.9 That “Force Majeure” has been identified under the Power Purchase Agreement dated 27.12.2017 in Article 11.3 which inter alia covers any act of God resulting in evacuation of power being disrupted from the Delivery points, as well as any event of force majeure identified under the Power Purchase Agreement entered between the Respondents. The relevant portion of the said Article 11.3 of the Power Purchase Agreement (Page 84 of the Petition) is being reproduced hereunder for ready reference:

*“11.3.1 A **“Force Majeure”** means any event or circumstance or combination of events and circumstances as stated below that wholly or partly prevents or unavoidably delays an Affected party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:*

*a) **Act of God**, including, but not limited to lightning, drought, fire and explosion, (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, or tornado;*

b) ...

c) ...

*d) An event of force majeure **identified under Buyer-Buying Entities PSA** thereby affecting delivery of power from WPD to Buying Entity(ies).”*

7.10 That Article 11.7 (Page 86 of the Petition) of the Power Purchase Agreement dated 27.12.2017, inter alia provides for relief available for a Force Majeure event as under;

“11.7.1 Subject to this Article 11:

(a) No party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

(b) Every party shall be entitled to claim relief in relation to a Force Majeure event in regard to its obligations, including but not limited to those specified under Article 4.5;

(c)

(d) Provided that no payments shall be made by either Party affected by a Force Majeure Event for the period of such event on account of its inability to perform its obligations due to such Force Majeure Event.”

7.11 That Article 4.4.1 of the Power Purchase Agreement dated 27.12.2017 inter alia provides for revision of CUF once within first year of COD and further envisages relaxation of 90% CUF in circumstances of grid non availability for evacuation which is beyond the control of the developer. The said Article 4.4.1 (*Page 69 of the Petition*) is reproduced hereunder for ready reference:

*“4.4.1 The Developer will declare the CUF of the Project **and will be allowed to revise the same once within first year of COD.** Buyer, in any Contract Year, shall not be obliged to purchase any additional energy from WPD beyond 178.704 Million kWh (MU). If for any Contract Year, it is found that the WPD has not been able to generate minimum energy of 134.028 Million kWh (MU), WPD shall be liable to pay the compensation provided in the PSA as payable to Buying Entity(ies) by Buyer to enable Buyer to remit the amount to Buying Entity(ies). This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be equal to the compensation payable by the Buying Entity(ies) towards non-meeting of their RPOs. WPD shall maintain generation so as to achieve CUF not less than 90% of their declared CUF value and not more than 120% of their declared CUF value during PPA duration of 25 years. **The lower limit will, however be relaxable by Buyer to the extent of grid non availability for evacuation which is beyond the control of the Developer.** The CUF will be calculated every year from 1st April of the year to 31st March next year.*

R-2 has submitted that in the peculiar facts and circumstances of the present case, this Hon'ble Commission may consider revision of CUF with appropriate relaxation as envisaged in Article 4.4.1 of the Power Purchase Agreement dated 27.12.2017. The R-2 has further submitted that since they have Generation data of 148 days only in Contract year One and this is not representative of one full year, data from 01.04.24 to 31.03.25 be considered as Contract year One for the purpose of reset of CUF.

8. **Additional submissions of HPPC, dated 09.07.2024, to the reply filed by M/s. Nani Virani Wind Energy Pvt. Ltd. (R-2):**

8.1 That the defences raised by the Respondent no. 2 in the reply are summarized hereunder, which shall be adverted to head-wise in detail hereunder –

- a) The compensation under Clause 6.8.3 is not payable owing to the existence of Force Majeure event at the site disrupting Wind Power generation for over 5 months i.e. 12.07.2022 till 06.12.2022.

- b) Existence of the Force majeure event was never disputed by the Petitioner or the Respondent no. 1 and therefore, no compensation is payable as per conditions of the PPA;
- c) Considering grid non-availability owing to the Force Majeure event for 5 months, the Hon'ble Commission may consider revision of CUF with appropriate relaxation as envisaged in Article 4.4.1 of the PPA; and
- d) Since generation data is only available for 148 days in Contract year one and this is not representative of one full year, it is proposed that data from 01.04.2024 to 31.03.2024 be considered as Contract year one for the purpose of reset of CUF.

RE: a) No compensation payable due to existence of the Force Majeure event for five months i.e. 12.07.2022 till 06.12.2022 –

8.2 That the provisions of Article 11.5, provides the mandatory pre-requisites for an affected party to claim any relief for a Force Majeure Event and the same reads as under :-

“11.5 Notification of Force Majeure Event

11.5.1 The Affected Party shall give notice to the Other Party of any event of Force Majeure as soon as reasonably practicable, but not later than Seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement.

Provided that such notice shall be pre-condition to the Affected Party's entitlement to claim relief under this Agreement, Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

11.5.2 The Affected Party shall give notice to the other Party of (i) the cessation of the regular event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.”

8.3 That it is incumbent upon the Respondent no. 2 to satisfy the Respondent no. 1/Petitioner regarding full particulars of the event of Force Majeure event, its effect on

the party claiming relief and the remedial measures taken. Further thereto, it is mandatory upon the affected party to send not less than monthly reports on the progress of remedial measures. Needless to state that the foregoing provision is mandatory in its letter and intent. In the instant case, however, the Respondent no. 2 failed to fulfil the said conditions in entirety, pursuant to which their claim/relief for Force majeure event had been expressly rejected by the Respondent no. 1. Reliance is placed upon the letter of the Respondent no. 1 dated 20.02.2023 (Annexure R-3), wherein it was categorically mentioned that "*M/s NVWEPL has not provided any notification issued by the competent state/central authority/agency (as applicable) for declaration of flood event in the region.*" It was also made explicit that the Respondent no. 2 is not entitled to any grant of time extension on account of alleged heavy rainfall. The burden of proof of the force majeure is on the Respondent no. 2 who is claiming force majeure and therefore, it was mandatory upon the Respondent no. 2 to adduce evidence thereto. The Respondent no. 2 admittedly failed to discharge the burden.

- 8.4 That despite knowing the terms of the PPA, the Respondent no. 2 has only been writing formal letter to the Respondent no.1 without providing requisite details as sought for by them for considering any relief as regards alleged Force Majeure event. Therefore, the Respondent no. 2 did not comply with the mandatory requirement of PPA. It is a trite law that when PPA required notice to be issued in a particular manner, it has to be in that particular manner and in no other manner. Hon'ble APTEL in its Judgement dated 03.06.2016 in Appeal No. 97 of 2016 in the case of *Talwandi Sabo Power Limited V/s. Punjab State Power Corporation Limited and Ors.*, had considered the notice for synchronization to be mandatory and emphasized the use of the word "shall". It was also held that if the agreement provides for notice to be given in a particular manner, then it has to be given in that manner only and not in any other manner.

RE: b) Existence of the Force majeure event was never disputed by the Petitioner or the Respondent no. 1 and therefore, no compensation is payable as per conditions of the PPA:-

- 8.5 That the Petitioner has made a factually incorrect averment to the effect that the existence of force majeure has not been disputed. The claim of the Respondent no. 2 regarding force majeure event had been expressly rejected by the Respondent no. 1. Further thereto, in the letter dated 20.02.2023, Respondent no. 1 elaborated on the defaults of the Respondent no. 2 in commissioning of the Project, which *inter alia* included non-grant of any time extension, termination of balance capacity of 20 MW, levy of penalty on termination of 20 MW capacity as well as delay in commissioning of

last 20 MW. Along with the same, it was mentioned that decision on blacklisting will also be conveyed as and when received from MNRE. The said decision has not been disputed by the Respondent no. 2 and no challenge to the same has been raised before the Appropriate Commission in terms of the Article 16 of the PPA. Article 16 of the PPA provides procedure for 'Dispute Resolution'. In view of there being no challenge to the same, the Respondent no. 2 is legally estopped to take shield of 'Force Majeure Event' as an excuse from the performance of their obligations.

RE: c) Hon'ble Commission may consider revision of CUF with appropriate relaxation as envisaged in Article 4.4.1 of the PPA –

- 8.6 That the Respondent no. 2 has contended that owing to non-availability of grid for five months i.e. 12.07.2022 till 06.12.2022, this Hon'ble Commission may consider revision of CUF with appropriate relaxation in terms of Article 4.4.1 of the PPA dated 27.12.2017. The said contention of the Respondent no. 2 is based on misleading interpretation of the term of the PPA and is untenable being impermissible in view of the specific conditions stipulated in the PPA.
- 8.7 That in terms of Clause 4.4.1 of the PPA, the Respondent no. 2 was required to declare the annual CUF of the Project and was allowed to revise the same only once within the first year of COD. However, the Respondent No. 2 did not revise the annual CUF within first year of COD (i.e 13.05.2022). As such, the annual CUF declared by Respondent No. 2 at the time of bidding is freezed for the tenure of the Agreement. Further, the lower limit of the CUF is 'relaxable' at the discretion of the Buyer to the extent of grid non availability for evacuation which is beyond the control of the developer. But such relaxation as well is permissible subsequent to the Developer establishing the non-availability beyond the control. In view of the failure of the Respondent no. 2 to establish existence of Force Majeure event entitling them for any relief on account of the same, the plea of revision in CUF for 5 months of alleged non-availability of grid is also consequently, not available to the Respondent No. 2. Once it was open for the Respondent no. 2 to seek revision in CUF within the first year of COD and no such revision was deliberately sought, the Respondent no. 2 is legally stopped to urge any contention at this stage to seek revision in the CUF without complying with their obligation in terms of the PPA within the stipulated time period. It is a trite law that a Contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties.

- 8.8 That if it is considered that the Respondent no. 2 is entitled to seek relaxation in CUF for the period of 5 months as alleged by them, even in that case, the Respondent no. 2 is obligated to ensure that the supply of proportionate minimum energy for the balance contract year i.e. 13.05.2022 to 11.07.2022 and 07.12.2022 to 31.03.2023. Article 4.4.1 only provides the discretion of relaxation for the period of grid non-availability. It does not in any manner exempt the Respondent no. 2 from the obligation to supply minimum energy for the balance part of the 1st contract year.
- 8.9 That the prayer of the Respondent no. 2 seeking relaxation in the CUF from this Hon'ble Commission is beyond the purview and the jurisdiction of the Hon'ble Commission. The PPA confers limited jurisdiction to the Hon'ble Commission i.e. to determine the amount of compensation in case of shortfall in supply of minimum energy. It is beyond the domain of the Hon'ble Commission to consider giving any relaxation of CUF to the Respondent no. 2, more so when the same was never sought for by the Respondent no. 2 from the Respondent no. 1 in terms of Article 4.4.1 of the PPA. The contention of the Respondent no. 2, viewed from any which aspect, is contrary to the terms of the PPA, illegal and untenable.

RE: d) Data from 01.04.2024 to 31.03.2025 be considered as Contract year one for the purpose of reset of CUF–

- 8.10 That the Respondent no. 2 has further, in complete violation to the terms of the PPA, has contended since the generation data of only 148 days in available qua the first Contract year, therefore data from 01.04.2024 to 31.03.2025 be considered as Contract year one. The said contention/proposal of the Respondent no. 2 is contrary to the terms of the PSA/PPA and way misleading. To expound on the same, it is first relevant to set out following salient dates –

<u>Date</u>	<u>Event</u>
13.12.2017	Power Sale Agreement (PSA) was executed between the Solar Energy Corporation of India Ltd (SECI) and Haryana Power Purchase Centre for sale of 250 MW wind power on long term basis.
27.12.2017	Power Purchase Agreement (PPA) was executed between M/s Nani Virani Wind Energy Private Limited (Wind Power Developer) and Solar Energy Corporation of India Ltd (SECI) to sell 50 MW of Wind Power to HPPC for 25 years from the COD of the Project.
03.05.2019	Initial Scheduled Commissioning Date of M/s Nani Virani Wind Energy Private Limited Project
12.09.2021	Commissioning Date of 1 st part capacity of 10 MW of project of the Respondent no. 2
12.12.2021	Revised Scheduled Commercial Operation Date
23.02.2022	Commissioning Date of 2 nd part capacity of 10 MW of project of the Respondent no. 2

13.05.2022	Commissioning Date of 3 rd part capacity of 10 MW of project of the Respondent no. 2
13.05.2022 to 31.03.2023	First Contract year of the instant project.
12.07.2022 to 06.12.2022	Alleged affected period of Force Majeure
13.05.2022 to 11.07.2022 07.12.2022 to 31.03.2023	Unaffected period of First Contract Year
20.02.2023	The balance capacity of 20 MW to be supplied by project of Respondent no. 2 - M/s Nani Virani Wind Energy Private Limited was terminated by Respondent no. 1 – SECI. The total project capacity was thus, restricted to 30 MW.

- 8.11 That there was delay in the commissioning of the project and only part commissioning had been done while the balance contracted capacity was terminated by the Respondent no. 1. As the date of commissioning of the final part capacity of 10 MW was 13.05.2022 i.e. when the Plant was commissioned for supply of 30 MW, 'First Contract year' was considered w.e.f. 13.05.2022 to 31.03.2023.
- 8.12 That the Respondent no. 2 has never raised any dispute as regards the meaning and applicability of the term 'Contract Year' vis-à-vis alleged Force Majeure event. A comprehensive & harmonious perusal of the clauses /provisions of PSA/PPA demonstrate that the First 'Contract year' means the period beginning from the Commercial Operation Date and ending on the immediately succeeding March 31. An alleged happening of any Force majeure event within such contract year cannot relieve the Respondent no. 2 to meet their obligations for the unaffected period. Logically speaking, there is no justification for the Respondent no. 2 seeking an exemption from the performance in term of the PPA for the unaffected period of the Contract Year. As such, the contention of the Respondent no. 2 is untenable and liable to be rejected.
- 8.13 That the Respondent no. 2 has misconstrued and mis projected the provisions of clause 4.4.1 of the PPA to set up a frivolous ground to wriggle out of their apparent defaults under the PPA. A plain reading of clause 4.4.1 of the PPA would show unequivocally that Respondent no. 2 was obligated to maintain supply of minimum contracted energy for the first Contract Year or for the unaffected period of the first Contract Year.
- 8.14 That it is a settled law that the contractual terms which are unambiguous, cannot be supplied meaning other than what the reading of plain language confers. Hon'ble Supreme Court in *Rajasthan State Industrial Development and Investment Corporation and Ors. v. Diamond and Gem Development Corporation Ltd. and Ors.*, (2013) 5 SCC

470 held that it is not permissible for a Court to supply new meaning to the provisions of a Contract, howsoever reasonable, when the terms of the Contract are clear and unambiguous. The relevant extract of the judgment is quoted as under:

“IV. Interpretation of terms of contract

16. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely.”

Additional Submissions in alternative–

- 8.15 That without prejudice to foregoing submissions, certain additional submissions are set out hereunder in the alternative *qua* the computation of the compensation in terms of the Article 6.8.3 of the PSA as well as Article 4.4.1 of the PPA.
- 8.16 That the Petitioner, vide the affidavit dated 10.04.2024 had submitted the figure for actual shortfall in the energy supplied by the Respondent no. 2 for the period 13.05.2022 to 31.03.2023 as under:-

Particulars	Energy (in units)
Minimum Mus to be provided as per SECI-HPPC PSA (corresponding to 250 MW)	68,39,40,000
Minimum Mus to be provided as per SECI-HPPC PSA (corresponding to 50 MW)	13,67,88,000
Minimum Mus to be provided as per SECI-HPPC PSA (corresponding to 30 MW)	8,20,72,800
Minimum Mus to be provided as per SECI-HPPC PSA (corresponding to 30 MW & Contract Year)	7,26,28,807
Energy Supplied by M/s Nani Virani in its first Contract year (i.e. 13.05.2022 to 31.03.2023)	1,22,14,408
Shortfall in supply of energy	6,04,14,399

- 8.17 That in the event, the Hon'ble Commission considers that a period of 12.07.2022 till 06.12.2022 needs to be excluded from the first Contract year and the compensation has to be calculated for the proportionate energy, the balance days to be considered shall be as under:-

Contract year One as per Article 1.1	13.05.2022 to 31.03.2023
--------------------------------------	--------------------------

No. of days in Contract year One (A)	323
Force Majeure Period	12.07.2022 to 06.12.2022
Number of days of Force Majeure (B)	148
Balance unaffected days in Contract year One (C) = (A-B)	175

8.18 That in the foregoing unaffected period, the actual energy supplied by the Respondent no. 2 is tabulated as under –

Period	Energy supplied by M/s Nani Virani (in kWh)
13-05-2022 to 31.05.2022	1707065
Jun-22	2031840
Jul-22	417815
Aug-22	0
Sep-22	0
Oct-22	0
Nov-22	0
Dec-22	427475
Jan-23	2657010
Feb-23	2421680
Mar-23	2551522.5
Total	1,22,14,408

8.19 That considering the foregoing, the shortfall in the minimum energy as per Article 6.8.3 of the PSA as well as Article 4.4.1 of the PPA is worked out in the alternative as under:-

	Calculation as per PSA	Calculation as per PPA
Energy to be supplied on pro-rata basis for 175 days	39349972.6	38556000
Actual Energy supplied by Nani Virani	12214408	12214408
Shortfall	27135565	26341593

8.20 Thus, in all events, there is shortfall in minimum energy committed to be supplied by the Respondent no. 2 and they are liable to compensate the Petitioner in terms of Article 6.8.3 of the PSA. As such, the Petition filed by the Petitioner is liable to be allowed by the Hon'ble Commission.

9. **Additional submissions of HPPC, dated 06.08.2024, submitting the proposal of compensation recoverable from the respondent no. 2 in compliance of the Commission's order dated 18.07.2024**

9.1 That the shortfall computation, as per PSA works out as under –

Particulars	Energy (in units)
Minimum Mus to be provided as per SECI-HPPC PSA (corresponding to 250 MW)	683940000
Minimum Mus to be provided as per SECI-HPPC PSA (corresponding to 50 MW)	136788000
Minimum Mus to be provided as per SECI-HPPC PSA (corresponding to 30 MW)	82072800
Minimum Mus to be provided as per SECI-HPPC PSA (corresponding to 30 MW & Contract Year)	72628807
Energy Supplied by M/s Nani Virani in its first Contract year (i.e. 13.05.2022 to 31.03.2023)	12214408
Shortfall in supply of energy as per PSA	60414399

- 9.2 That in the Rejoinder to the reply of the Respondent no. 2, the shortfall units as per both PPA and PSA were mentioned in alternative which was excluding the alleged affected period as contended by the Respondent no. 2. However, as per the case of the Petitioner, the shortfall in units as per the PPA works out as under –

Particulars	Energy (in units)
Minimum Mus to be provided as per SECI-WPD PPA (corresponding to 50 MW)	134028000
Minimum Mus to be provided as per SECI-WPD PPA (corresponding to 30 MW)	80416800
Minimum Mus to be provided as per SECI-WPD PPA (corresponding to 30 MW & Contract Year)	71163360
Energy Supplied by M/s Nani Virani in its first Contract year (i.e. 13.05.2022 to 31.03.2023)	12214408
Shortfall in supply of energy as per PPA	58948953

- 9.3 That the proposed computation for the compensation for shortfall units is worked out considering the shortfall units both as per PPA and PSA. The details of the computation are set out hereunder based on the loss suffered by HPPC owing to short supply under PSA/PPA. The excess month wise average rate of power purchased by the State of Haryana in the IEX during FY 2022-23 and the REC rate for FY 2022-23 has been considered as loss suffered owing to non-supply of power by the Respondent no. 2. The tariff paid by the HPPC to Respondent no. 1 i.e. SECI under the PSA is Rs. 2.72/kWh. The differential tariff (i.e. difference of tariff payable under PSA and actual loss (power procurement cost through IEX + REC rate) is worked out month-wise. The said differential tariff is thereafter multiplied with shortfall units to work out net loss owing to short supply by Respondent no. 2. The HPPC shall be compensated for the said differential cost qua the shortfall units, which is computed hereunder for the kind reference of the Hon'ble Commission –

Period (FY 2022-23)	Shortfall in supply of minimum energy as per PSA	Shortfall in supply of minimum energy as per PPA	Month-wise average rate of Power Exchange (IEX) for FY 2022-23 (Rs/kWh)	Tariff paid to SECI/W PD (Rs/kWh)	REC rate for FY 2022- 23 (Rs/k Wh)	Compensatio n to be payable by SECI/WPD as per PSA (in Rs.)	Compensation to be payable by SECI/WPD as per PPA (in Rs.)
	1	2	3	4	5	6= (3+5)-4 *1	6 = (3+5)-4 *2
May	2565218	2479015	6.76	2.72	1	12928697.35	12494235.6
June	4713870	4577760	6.49	2.72	1	22485157.94	21835915.2
July	6552752	6412105	5.41	2.72	1	24179653.32	23660667.45
August	6970567	6829920	5.17	2.72	1	24048454.69	23563224
September	6745710	6609600	5.63	2.72	1	26375724.5	25843536
October	6970567	6829920	3.83	2.72	1	14707895.48	14411131.2
November	6745710	6609600	4.6	2.72	1	19427643.62	19035648
December	6543092	6402445	5.19	2.72	1	22704527.77	22216484.15
January	4313557	4172910	6.18	2.72	1	19238462.33	18611178.6
February	3874316	3747280	6.68	2.72	1	19216605.46	18586508.8
March	4419044	4278397.5	5.43	2.72	1	16394653.52	15872854.73
Total	60414399	58948952				22,17,07,476	21,61,31,383

10. **Additional submissions of R-1 (SECI), dated 24.08.2024, on the proposal of HPPC dated 06.08.2024 on the compensation recoverable from the respondent no. 2.**

JURISDICTION

- 10.1 That the law as laid down by the Hon'ble Supreme Court and the Hon'ble Appellate Tribunal for Electricity regarding the jurisdiction of State Electricity Regulatory Commissions to deal with issues concerning generating companies having a composite scheme for generation and sale of electricity in more than one State, are placed below:-
The Hon'ble Supreme Court in the case of *Energy Watchdog Vs. CERC & Ors.*, (2017) 14 SCC 80 held as under:

"24. The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in clauses (a), (b) and (d), and "intra-State" in clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State.

.....

26. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a "composite scheme". This makes it clear that the expression "composite scheme" does not have some special meaning — it is enough

that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.”

10.2 That following the aforesaid law as declared by the Apex Court, the Hon'ble Appellate Tribunal of Electricity on 13.04.2024, in the matter of *Solar Energy Corporation of India vs KERC and Anr.* (Appeal 414 2022), also held that Section 86(1)(b) of the *Electricity Act, 2003* only empowers the State Commission to approve/ not approve the Power Purchase Agreement, at the initial stage. This provision, however, does not empower the State Commission to regulate implementation of Power Purchase Agreement for all times to come in future also and to adjudicate upon the disputes arising between the parties therein. Relevant extracts of the judgment are extracted hereunder:

“21. Section 79(1)(f) of the Act empowers the Central Commission to adjudicate upon the disputes involving generating companies or transmission licensees in the matters connected with clauses (a) to (d) of the said Section. Therefore, any dispute involving a generating station or a transmission licensee covered under Clauses (a)(b) & (c) will fall within the jurisdiction of the Central Commission. It appears that since the generating companies owned by Central Government and the generating companies having a composite scheme for generation and sale of Electricity in more than one State have Pan India presence, the Parliament found it proper and prudent to subject such companies to a special treatment and, therefore, have been brought under the jurisdiction of the Central Commission vide Section 79 of the Act. The primary object for such exercise appears to be uniformity of tariff amongst more than one State beneficiaries and prescribing uniform terms and conditions of supply of electricity to more than one State.

22. It is notable that Clauses (a) (b) & (c) of Section 79 (1) of the Act begin with the expression “to regulate”. It is only the clause (d) which begins with the term “to determine tariff”. “Regulation of Tariff” is totally distinct from “Determination of tariff”. Regulation of Tariff includes all the necessary terms and conditions relating to the tariff such as billing, consequences of delay in payment of electricity charges, rebate, termination, suspension of electricity supply, payment of security, etc.

23. Section 86(1)(b) of the Act, provides for regulating the role of Distribution Licensees in the procurement of power and 86(1)(f) relates to adjudication upon the disputes between the licensees and generating companies by the State Commission. These are general provisions and have to be read subject to Section 79(1) (a) to 79(1)(d) of the Act. In so far as the generating companies who have a composite scheme for generation and sale of electricity in more than one State, the role of the State Commission would be only to decide whether the PPA to be entered into by them and a distribution company

for sales/purchase of electricity at the tariff determined by Central Commission, has to be approved or not. In doing so, the State Commission would take into consideration various factors including the availability of power from other sources at a cheaper or in a more economical manner to be supplied to the consumers in the State. Thus, the State Commission has a limited role to play with regards to the sale of electricity under a composite scheme and it has no power to suggest any modifications to the terms and conditions of the PPA/PSA to be executed between a generating company, a distribution company and an inter-mediary.

24. In view of the scheme of the Act, as specified more particularly in Section 79 & 86, it would be anomalous to permit State Commission to claim concurrent jurisdiction along with the Central Commission in any dispute arising out of a composite scheme for generation and sale of electricity in more than one State, which is covered by Section 79(1) (b) of the Act. The jurisdiction of the Central Commission would be only in respect of the matters other than those which fall within the jurisdiction of the State Commission under Section 79 of the Act. In other words, if any matter falls under the scheme of 79(1)(a) to 79(1)(d) of the Electricity Act, 2023, the provisions of Section 86(1)(f) are of no application.....

...

25. We are further of the opinion that a close and meaningful interpretation of the provisions of Section 79 & 86 of the Act, would indicate that the adjudicatory powers of the Central Commission under 79(1)(f) are not restricted to only determination of tariff as well as the Regulation of tariff but include the other disputes or differences between generating companies and transmission licenses which necessarily impact the regulation of tariff. This would include fulfillment/non-fulfillment of conditions precedent as well as conditions subsequent, claim for extension of time in commissioning all projects on the ground of Force Majeure events etc. Even though disputes on these subjects do not specifically relate to determination or the regulation of tariff but these would necessarily have a direct bearing upon the regulation of tariff and, therefore, would come under the purview of the Central Commission under Section 79 of the Act.

26. We may also note that Section 61 of the Electricity Act empowers the Appropriate Commission i.e. Central Commission or State Commission as the case may be, to specify the terms and conditions for determination of tariff upon consideration of various factors as stated therein. When the provisions of Section 61 are read in conjunction with Section 79, it would become manifest that these two provisions do not deal merely with tariff but all the terms and conditions to be kept in mind for determination of tariff. Section 178 of the Electricity Act empowers the Central Commission to make regulations relating

to inter alia, the terms and conditions for determination of tariff under Section 61. Therefore, the Central Commission has the power not only to notify the regulations with reference to the terms and conditions of the tariff but also to implement such regulations in all respects.

27. On the other hand, the jurisdiction of the State Commission under Section 86(1)(b) of the Act refers only to initial stage where approval is to be granted or not to be granted to the Power Purchase Agreement providing for purchase of power at the price and other terms and conditions specified therein. This provision does not empower the State Commission to regulate implementation of Power Purchase Agreement for all times to come in future also and to adjudicate upon the disputes arising between the parties therein. Holding otherwise would tantamount to permit the State Commissions to make inroads with the functioning of the Central Commission which would militate against the very scheme of Act, as discussed hereinabove.

In the present case, Respondent No. 2 (the generating company) has set up a 30 MW wind power plant at Kutch, Gujarat and is supplying the entire power generated from the project to the discoms in Haryana. Since the generation and supply of electricity are taking place in different States, the Central Electricity Regulatory Commission is the appropriate Commission for adjudicating the issue at hand. It is a settled principle of law that the parties cannot by consent (Article 6.8.3 of the PSA) confer jurisdiction, where there is none.

Thus, the present petition, filed by the Petitioner under Section 86(1)(b) of the Electricity Act, 2003 read with Clause 6.8.3 of PSA, is not maintainable, as this Hon'ble Commission does not have jurisdiction to deal with the present petition

- 10.3 That without prejudice to the aforementioned submissions, it is submitted that Power Supply Agreement (PSA) dated 13.12.2017 between SECI and HPPC and the Power Purchase Agreement (PPA) dated 27.12.2017 between SECI and M/s Nani Virani Wind Energy Private Limited (Respondent No. 2) are back-to-back agreements. Therefore, they are not separate transactions; they are part and parcel of one single transaction even in accordance with the provisions of PPA. The Petitioner in its proposal has submitted the following two different computations of shortfall, allegedly terms of the PSA and the PPA. There is a difference in Petitioner's computation of the Minimum MUs to be provided as per the PPA and the PSA. As per the Petitioner in terms of the SECI-HPPC PSA (corresponding to 50 MW), minimum energy to be supplied is 136788000 kWh (and not 134028000 kWh). Without prejudice to the fact that the PPA and the PSA are back to back agreements and part of one single transaction, it is submitted that the

PSA itself specifically provides the minimum energy as 134028000 kWh (please see Schedule I).

- 10.4 That the PPA entered into between SECI and Respondent No. 2, *inter alia*, provides as under:

"F SECI has agreed to purchase such Wind Power from the WPD as an intermediary Seller and sell it to Buying Utilities back to back basis as per the provisions of above stated scheme, accordingly SECI has agreed to sign a Power Sale Agreement with the Buying Entity(ies) to sell such power as per the provisions of the above said scheme."
..."

- 10.5 That Article 4.4 of the PPA (50MW) signed between SECI and Respondent No. 2 provides as under:

"4.4 Right to Contracted Capacity & Energy

4.4.1 The Developer will declare the CUF of the Project and will be allowed to revise the same once within the first year of COD. Buyer, in any Contract Year, shall not be obliged to purchase any additional energy from the WPD beyond 178.704 Million kWh (MU). If for any Contract Year, it is found that the WPD has not been able to generate minimum energy of 134.028 Million kWh (MU), WPD shall be liable to pay the compensation provided in the PSA as payable to Buying Entity(ies) by Buyer to enable Buyer to remit the amount to Buying Entity(ies). This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be equal to the compensation payable by the Buying Entities towards non-meeting of their RPOs. WPD shall maintain generation so as to achieve CUF not less than 90% of their declared CUF value and not more than 120% of their declared CUF value during PPA duration of 25 years. The lower limit will, however, be relaxable by Buyer to the extent of grid non availability for evacuation which is beyond the control of the developer. The CUF will be calculated every year from 1st April of the year to 31st March next year."

- 10.6 That Article 6.8.3 of the PSA signed between SECI and HPPC provides as under:

"6.8.3 The WPD will declare the CUF of the Project and will be allowed to revive the same once within the first year of COD. HPPC, in any Contract Year, shall not be obliged to purchase any additional energy from the SECT/WPD beyond 911.92 Million kWh (MU). If for any Contract Year, it is found that the WPD has not been able to generate minimum energy of 683.94 Million kWh (MU) WPD shall be liable to pay only such compensation at the rate decided by the State Electricity Regulatory Commission on HPPC for such shortfall in meeting of the RPOs and shall duly pay such compensation to SECL to enable SECI to remit the amount to HPPC. This compensation shall be proportional to the amount of shortfall in wind energy during the Contract Year. WPD

shall maintain generation so as to achieve CUF not less than 90% of their declared CUF value and not more than 120% of their declared CUF value during PPA duration of 25 years. The lower limit will, however, be relaxable by SECI to the extent of grid non availability for evacuation which is beyond the control of the developer. The CUF will be calculated every year from 1st April of the year to 31st March next year.

...

SCHEDULE 1: LIST OF LOAs ISSUED TO WPDs

Sl. No.	WPD	Project Capacity	CUF%			Energy (MUs)			Applicable tariff as per PPA (Rs/KWh)
			Declared	Min. (-90%)	Max. (+120%)	Declared	Min. (-90%)	Max. (+120%)	
6	Inox Wind Infrastructure Services Ltd.-4	50	34	30.6	40.8	148.92	134.028	178.704	2.65

10.7 That, in terms of the aforesaid clauses, if Respondent No. 2 is not able to generate minimum energy of 134.028 Million kWh (MU) for a year [as against 50MW], Respondent No. 2 is liable to pay compensation for such shortfall in meeting of the RPOs to SECI, to enable SECI to remit the amount to HPPC. This compensation shall be proportional to the amount of shortfall in wind energy during the Contract Year. The Term "Contract Year" has been defined in the PSA and the PPA as under:

PSA (250MW) signed between SECI and HPPC:

"Contract Year" shall mean the period beginning from the Effective Date and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31 provided that first Contract Year shall start from Commercial Operation Date of the Project and the last Contract Year of this Agreement shall end on the last day of the Term of this Agreement.

PPA (50MW) signed between SECI and Respondent No. 2:

"Contract Year" shall mean the period beginning from the Effective Date and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31 provided that:

- (i) *In the financial year in which the Scheduled Commissioning Date would occur, the Contract Year shall end on the date immediately before the Scheduled Commissioning Date and a new Contract Year shall commence once again from*

the Scheduled Commissioning Date and end on immediately succeeding March, 31 and thereafter each period of twelve (12) months commencing on April 1 and ending on March 31, and

(ii) Provided further that the last Contract Year of this Agreement shall end on the last day of the Term of this Agreement

10.8 That the minimum energy obligations to HPPC to the extent of 50 MW capacity mapped from the PPA with Respondent No. 2 shall be applicable as per Article 4.4.1 of the PPA on a back-to-back basis to HPPC under the PSA. Further, minimum supply obligations as specified in Article 4.4.1 of the PPA for the Contract Year shall be considered on *pro-rata* basis for the project capacity commissioned (30 MW) under the PPA and from the COD of the project (13.05.2022). The calculation of shortfall in supply of energy by Respondent No. 2 under the PPA and correspondingly under the PSA on back to back basis is given in Table – 1 below:

Particulars	Energy (kWh)
Minimum supply obligations as per Article 4.4.1 of the PPA signed with M/s Nani Virani Wind Energy Private Limited or as per Article 6.8.3 read with Schedule 1 of the PSA signed with HPPC (corresponding to 50 MW)	134028000
Minimum supply obligations as per Article 4.4.1 of the PPA signed with M/s Nani Virani Wind Energy Private Limited or as per Article 6.8.3 read with Schedule 1 of the PSA signed with HPPC (corresponding to 30 MW)	80416800
Minimum supply obligations as per Article 4.4.1 of the PPA signed with M/s Nani Virani Wind Energy Private Limited or as per Article 6.8.3 read with Schedule 1 of the PSA signed with HPPC (corresponding to 30 MW and from COD i.e. 13.05.2022 to 31.03.2023)	71163360
Actual Energy supplied to HPPC by M/s Nani Virani Wind Energy Private Limited through SECI from COD i.e. 13.05.2022 to 31.03.2023 as per the invoices	12214407.5
Shortfall in Energy terms	58948952.5

10.9 That SECI is a merely an intermediary whose role is to supply energy from the Generator to DISCOM on back to back basis. The Hon'ble Appellate Tribunal of Electricity (**Hon'ble Tribunal**) in its judgment dated 04.11.2011 in Appeal No. 15 of 2011 in the case of *Lanco Power Limited v Haryana Electricity Regulatory Commission and Ors*, held that a trader is only acting as an intermediary in a back to back arrangement. Relevant extracts of the judgment are reproduced hereunder:

“21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant

trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.”

Thus, SECI cannot be held in any manner liable for any shortfall in generation by the WPD.

10.10 That in terms of Article 6.8.3 of the PSA signed between SECI and HPPC, compensation is payable to HPPC for shortfall in meeting of the RPOs by the distribution licensees. In the present case, for FY 2022-23, a perusal of the true up order dated 05.03.2024 passed by this Hon'ble Commission in HERC/Petition No. 69 of 2023 and HERC/Petition No. 70 of 2023, reveals that the DISCOMS were surplus in their RPO. Without prejudice to the fact that this Hon'ble Commission lacks jurisdiction to deal with the issue raised in the present petition, it is submitted that the amount of compensation as decided by this Hon'ble Commission after considering shortfall in meeting of the RPOs (if any), ought to be paid by Respondent No. 2 to SECI to enable SECI to remit the amount to the Petitioner.

11. Additional submissions of M/s. Nani Virani Wind Energy Pvt. Ltd. (R-2), dated 10.10.2024.

11.1 That the Petitioner has submitted three different data for shortfall in supply of energy for the period 13/05/2022 to 31/03/2023 by the Respondent No. 2. According to submission of the Petitioner in the petition 'The shortfall in supply of energy for the period 13/05/2022 to 31/03/2023 comes out to 6,28,97,344 units. Further, the petitioner vide the affidavit dated 10/04/2024 had submitted the figure for actual "shortfall in the energy supplied" by the Respondent No. 2 for the period 13/05/2022 to 31/03/2023 as 6,04,14,399 units. And finally, the petitioner in its Rejoinder submits the shortfall in supply of energy by Respondent No. 2 to be considered as 27135565 units (as per PSA) and 26341593 units as per PSA for the same period i.e. 13/05/2022 to 31/03/2023.

11.2 That without prejudice to the earlier submission made by the Respondent No. 2 in its reply to the Petition of the Petitioner, it is important to mention the 'Renewable Purchase Obligation' (RPO) of the Petitioner as mentioned in clause 6.8.3, reproduced below:

*"The WPD will declare the CUF of the Project and will be allowed to revise the same once within first year of COD. HPPC, in any contract year, shall not be obliged to purchase any additional energy from the SECI/WPD beyond 911 .92 million kwh MU. **If for any contract year, it is found that the WPD has not been able to generate***

minimum energy of 683.94 million kwh (MU) WPD shall be liable to pay only such compensation at the rate decided by the State Electricity Regulatory Commission on HPPC for such shortfall in meeting the RPOs and shall duly pay such compensation to SECI to enable SECI to remit the amount to HPPC. This compensation shall be proportional to the amount of shortfall in wind energy during the contract year. WPD shall maintain generation so as to achieve CUF not less than 90% of their declared CUF value and not more than 120 % of their declared CUF value during PPA duration of 25 years The lower limit will, however, be relaxable by SECI to the extent of grid non-availability for evacuation which is beyond the control of the developer. The CUF will be calculated every year from 1st of April to 31st of March next year”.

- 11.3 That for seeking compensation from Respondent No.2, it is a condition precedent upon the Petitioner to first declare as to the quantum of energy which is a shortfall in meeting their ‘Renewable Purchase Obligation’ (RPO) in accordance with the provision of clause 6.8.3 of the PSA.
- 11.4 That vide Memo number 1254 dated: 09/05/2023 having subject “Renewable Purchase Obligation (RPO) compliance report of Discoms for the year 2022 -2023, it is submitted from the office of “The Director General, New and Renewable Energy Department, HAREDA, Akshaya, Urja Bhavan, Sector 17, Panchkula” to “The Secretary. Haryana State Regulatory Commission, Bays No. 33-36, Sector-4, Panchkula” that in compliance of HERC Regulation No. HERC/53/2021 2nd Amendment/2022, Discoms has achieved entire RPO targets under category “Other RPO”, WPO and HPO for the year 2022-2023.
- 11.5 That as per clause 6.8.3 of the PSA, the WPD are obligated to pay only such compensation at the rate decided by the State Electricity Regulatory Commission on HPPC for such a shortfall in meeting the RPOs and duly pay such compensation to SECI to enable SECI to remit the amount to HPPC. In light of this fact one can very easily understand the reason behind giving different data with respect to shortfall in energy supplied by Respondent No. 2 and the quantum of compensation that HPPC, allegedly trying to get from a Respondent No. 2 without any legal sanity and against the provision of not only PSA, but also against the Regulatory Requirements of compensation envisaged for shortfall in meeting RPOs.

JURISDICTION

- 11.6 That the Hon’ble Supreme Court and the Hon’ble Appellate Tribunal for Electricity, have laid down the law regarding the jurisdiction of State Electricity Regulatory Commissions to deal with issues concerning generating companies having a composite scheme for generation and sale of electricity in more than one State.

- 11.7 The Hon'ble Supreme Court in the case of Energy Watchdog Vs. CERC & Ors., (2017) 14 SCC 80 held as under:

“22. The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in clauses (a), (b) and (d), and “intra-State” in clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.

.....

24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that the expression “composite scheme” does not have some special meaning — it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.”

- 11.8 That the Hon'ble Appellate Tribunal of Electricity on 13.04.2024, in the matter of Solar Energy Corporation of India vs KERC and Anr. (Appeal 414 2022), also held that: Section 86(1)(b) of the Electricity Act, 2003 only empowers the State Commission to approve/ not approve the Power Purchase Agreement, at the initial stage. This provision, however, does not empower the State Commission to regulate implementation of Power Purchase Agreement for all times to come in future also and to adjudicate upon the

disputes arising between the parties therein. Relevant extracts of the judgment are extracted hereunder for convenience:

21. Section 79(1)(f) of the Act empowers the Central Commission to adjudicate upon the disputes involving generating companies or transmission licensees in the matters connected with clauses (a) to (d) of the said Section. Therefore, any dispute involving a generating station or a transmission licensee covered under Clauses (a)(b) & (c) will fall within the jurisdiction of the Central Commission. It appears that since the generating companies owned by Central Government and the generating companies having a composite scheme for generation and sale of electricity in more than one State have Pan India presence, the Parliament found it proper and prudent to subject such companies to a special treatment and, therefore, have been brought under the jurisdiction of the Central Commission vide Section 79 of the Act. The primary object for such exercise appears to be uniformity of tariff amongst more than one State beneficiaries and prescribing uniform terms and conditions of supply of electricity to more than one State.

22. It is notable that Clauses (a) (b) & (c) of Section 79 (1) of the Act begin with the expression “to regulate”. It is only the clause (d) which begins with the term “to determine tariff”. “Regulation of Tariff” is totally distinct from “Determination of tariff”. Regulation of Tariff includes all the necessary terms and conditions relating to the tariff such as billing, consequences of delay in payment of electricity charges, rebate, termination, suspension of electricity supply, payment of security, etc.

23. Section 86(1)(b) of the Act, provides for regulating the role of Distribution Licensees in the procurement of power and 86(1)(f) relates to adjudication upon the disputes between the licensees and generating companies by the State Commission. These are general provisions and have to be read subject to Section 79(1) (a) to 79(1)(d) of the Act. In so far as the generating companies who have a composite scheme for generation and sale of electricity in more than one State, the role of the State Commission would be only to decide whether the PPA to be entered into by them and a distribution company for sales/purchase of electricity at the tariff determined by Central Commission, has to be approved or not. In doing so, the State Commission would take into consideration various factors including the availability of power from other sources at a cheaper or in a more economical manner to be supplied to the consumers in the State. Thus, the State Commission has a limited role to play with regards to the sale of electricity under a composite scheme and it has no power to suggest any modifications to the terms and conditions of the PPA/PSA to be executed between a generating company, a distribution company and an inter-mediator.

24. In view of the scheme of the Act, as specified more particularly in Section 79 & 86, it would be anomalous to permit State Commission to claim concurrent jurisdiction along with the Central Commission in dispute arising out of a composite scheme for generation and sale of electricity in more than one State, which is covered by Section 79(1) (b) of the Act. The jurisdiction of the Central Commission would be only in respect of the matters other than those which fall within the jurisdiction of the State Commission under Section 79 of the Act. In other words, if any matter falls under the scheme of 79(1)(a) to 79(1)(d) of the Electricity Act, 2023, the provisions of Section 86(1)(f) are of no application.....

25. We are further of the opinion that a close and meaningful interpretation of the provisions of Section 79 & 86 of the Act, would indicate that the adjudicatory powers of the Central Commission under 79(1)(f) are not restricted to only determination of tariff as well as the Regulation of tariff but include the other disputes or differences between generating companies and transmission licenses which necessarily impact the regulation of tariff. This would include fulfilment/non-fulfilment of conditions precedent as well as conditions subsequent, claim for extension of time in commissioning all projects on the ground of Force Majeure events etc. Even though disputes on these subjects do not specifically relate to determination or the regulation of tariff but these would necessarily have a direct bearing upon the regulation of tariff and, therefore, would come under the purview of the Central Commission under Section 79 of the Act.

26. We may also note that Section 61 of the Electricity Act empowers the Appropriate Commission i.e. Central Commission or State Commission as the case may be, to specify the terms and conditions for determination of tariff upon consideration of various factors as stated therein. When the provisions of Section 61 are read in conjunction with Section 79, it would become manifest that these two provisions do not deal merely with tariff but all the terms and conditions to be kept in mind for determination of tariff. Section 178 of the Electricity Act empowers the Central Commission to make regulations relating to inter alia, the terms and conditions for determination of tariff under Section 61. Therefore, the Central Commission has the power not only to notify the regulations with reference to the terms and conditions of the tariff but also to implement such regulations in all respects.

27. On the other hand, the jurisdiction of the State Commission under Section 86(1)(b) of the Act refers only to initial stage where approval is to be granted or not to be granted to the Power Purchase Agreement providing for purchase of power at the price and other terms and conditions specified therein. This provision does not empower the State Commission to regulate implementation of Power Purchase Agreement for all times to

come in future also and to adjudicate upon the disputes arising between the parties therein. Holding otherwise would tantamount to permit the State Commissions to make inroads with the functioning of the Central Commission which would militate against the very scheme of Act, as discussed hereinabove.

- 11.9 That in the present case, Respondent No. 2 (the generating company) has set up a 30 MW wind power plant at Kutch, Gujarat and is supplying the entire power generated from the project to the discoms in Haryana. Since the generation and supply of electricity are taking place in different States, the Central Electricity Regulatory Commission is the appropriate Commission for adjudicating the issue at hand. It is a settled principle of law that the parties cannot by consent (Article 6.8.3 of the PSA) confer jurisdiction, where there is none. Thus, the present petition, filed by the Petitioner under Section 86(1)(b) of the Electricity Act, 2003 read with Clause 6.8.3 of PSA, is not maintainable, as this Hon'ble Commission does not have jurisdiction to deal with the present petition.

Commission's Analysis and Order

12. The case was finally heard on 20.02.2025. The Commission heard the arguments of the parties at length as well as perused the written submissions placed on record by the parties. The same has already been reproduced earlier in the present order. Hence, for the sake of brevity and prolixity, the same is not being reproduced here.
13. The Commission has carefully considered the submissions and arguments of the parties, including case laws cited, in the matter. At the outset, the Commission considers it appropriate to examine the contention of the Respondent (s) regarding the jurisdiction of this Commission to decide the issue.
14. In order to examine the issue in hand, the Commission examined the functions of Central Commission and State Commissions, provided under Section 79 (1) and 86 (1) of the Electricity Act, 2003, respectively. It would be advantageous to note the comparative provisions of these two Sections by way of the table mentioned below :-

Section 79: Functions of Central Commission	Section 86: Functions of State Commission
<p>(1) The Central Commission shall discharge the following functions, namely:-</p> <p>(a) to regulate the tariff of generating companies owned or controlled by the Central Government;</p> <p>(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of</p>	<p>(1) The State Commission shall discharge the following functions, namely: -</p> <p>(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:</p> <p>Providing that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;</p>

<p>electricity in more than one State;</p> <p>(c) to regulate the inter-State transmission of electricity;</p> <p>(d) to determine tariff for inter-State transmission of electricity;</p> <p>(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.</p> <p>(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;</p> <p>(g) to levy fees for the purposes of this Act;</p> <p>(h) to specify Grid Code having regard to Grid Standards;</p> <p>(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees.</p> <p>(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;</p> <p>(k) to discharge such other functions as may be assigned under this Act.</p>	<p>(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;</p> <p>(c) facilitate intra-state transmission and wheeling of electricity;</p> <p>(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;</p> <p>(e) promote congeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licence;</p> <p>(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;</p> <p>(g) levy fee for the purposes of this Act;</p> <p>(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;</p> <p>(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;</p> <p>(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and</p> <p>(k) discharge such other functions as may be assigned to it under this Act.</p>
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15. In this regard, judgement of Hon'ble Supreme Court in the case of *Energy Watchdog Vs. CERC & Ors.*, (2017) 14 SCC 80 and Hon'ble APTEL dated 13.04.2024 in the matter of *Solar Energy Corporation of India vs KERC and Anr. (Appeal 414 2022)*, has amply dealt with the issue of jurisdiction of State Commissions or Central Commission, regarding generating companies having a composite scheme for generation and sale of electricity in more than one State. Hon'ble Supreme Court in its ibid judgement held that *".....Section 79(1)(b) is that generating companies must enter into or otherwise have a "composite scheme". This makes it clear that the expression "composite scheme" does not have some special meaning — it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State."*

Similarly, Hon'ble APTEL in its ibid judgement dated 13.04.2024 in the matter of *Solar Energy Corporation of India vs KERC and Anr. (Appeal 414 2022)* has held as under:-
"21. Section 79(1)(f) of the Act empowers the Central Commission to adjudicate upon the disputes involving generating companies or transmission licensees in the mattes

connected with clauses (a) to (d) of the said Section. Therefore, any dispute involving a generating station or a transmission licensee covered under Clauses (a)(b) & (c) will fall within the jurisdiction of the Central Commission. It appears that since the generating companies owned by Central Government and the generating companies having a composite scheme for generation and sale of Electricity in more than one State have Pan India presence, the Parliament found it proper and prudent to subject such companies to a special treatment and, therefore, have been brought under the jurisdiction of the Central Commission vide Section 79 of the Act. The primary object for such exercise appears to be uniformity of tariff amongst more than one State beneficiaries and prescribing uniform terms and conditions of supply of electricity to more than one State.

.....

23. Section 86(1)(b) of the Act, provides for regulating the role of Distribution Licensees in the procurement of power and 86(1)(f) relates to adjudication upon the disputes between the licensees and generating companies by the State Commission. These are general provisions and have to be read subject to Section 79(1) (a) to 79(1)(d) of the Act. In so far as the generating companies who have a composite scheme for generation and sale of electricity in more than one State, the role of the State Commission would be only to decide whether the PPA to be entered into by them and a distribution company for sales/purchase of electricity at the tariff determined by Central Commission, has to be approved or not. In doing so, the State Commission would take into consideration various factors including the availability of power from other sources at a cheaper or in a more economical manner to be supplied to the consumers in the State. Thus, the State Commission has a limited role to play with regards to the sale of electricity under a composite scheme and it has no power to suggest any modifications to the terms and conditions of the PPA/PSA to be executed between a generating company, a distribution company and an intermediary.

24. In view of the scheme of the Act, as specified more particularly in Section 79 & 86, it would be anomalous to permit State Commission to claim concurrent jurisdiction along with the Central Commission in any dispute arising out of a composite scheme for generation and sale of electricity in more than one State, which is covered by Section 79(1) (b) of the Act. The jurisdiction of the Central Commission would be only in respect of the matters other than those which fall within the jurisdiction of the State Commission under Section 79 of the Act. In other words, if any matter falls under the scheme of 79(1)(a) to 79(1)(d) of the Electricity Act, 2023, the provisions of Section 86(1)(f) are of no application.....

27. On the other hand, the jurisdiction of the State Commission under Section 86(1)(b) of the Act refers only to initial stage where approval is to be granted or not to be granted to the Power Purchase Agreement providing for purchase of power at the price and other terms and conditions specified therein. This provision does not empower the State Commission to regulate implementation of Power Purchase Agreement for all times to come in future also and to adjudicate upon the disputes arising between the parties therein. Holding otherwise would tantamount to permit the State Commissions to make inroads with the functioning of the Central Commission which would militate against the very scheme of Act, as discussed hereinabove.”

In this regard, it is pertinent to note the judgement of Hon’ble Supreme Court dated 25.10.2017, in Civil Appeal no. 6399 of 2016 titled as **Gujarat Urja Vikas Limited versus Solar Semiconductor Power Company (India) Private Limited and others**, wherein it was held that the terms of the contract between the parties cannot be substantially altered so as to prejudice the interest of parties. The relevant part of the order of Hon’ble Supreme Court is reproduced hereunder: -

“In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between the GUVNL and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs.15/- per unit for twelve years, the first respondent should commission the Solar PV Power project before 31.12.2011. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the rights of the consumers to whom the electricity is supplied, Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the consumers.”

Further, Hon’ble Supreme Court, in its judgement dated 13.04.2023, in the matter of Gujarat Urja Vikas Nigam Limited and Ors. vs. Renew Wind Energy (Rajkot) Private Limited and Ors. (Civil Appeal Nos. 3480-3481 of 2020), recorded as under:-

“53. The concurring view expressed by Banumathi J., crucially held that:

Sanctity of power purchase agreement

22.Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date, to the advantage of the

generating company, Respondent 1 and disadvantage of the Appellant. Terms of PPA are binding on both the parties equally.”

Thus, the in a composite scheme for generation and sale of electricity in more than one State, the role of the State Commission is limited to exercising prudence check while taking decision on the approval of the PPA taking into consideration of various factors such as the applicable tariff and availability of power from other sources at cheaper tariff. Such a decision of the Commission is also influenced by various other factors; the condition in the PPA for compensation for shortfall in the supply by the generator can be one such factor. The Commission is of the considered view that bar on the jurisdiction of this Commission imposed by Section 79 (1) of the Electricity Act, 2003, does not come in the way of implementation of the express provision in the PPA, qua the determination of compensation rate.

16. The Commission has examined clause 6.8.3 of Power Sale Agreement (PSA) dated 13.12.2017, entered into between the petitioner i.e. Haryana Power Purchase Centre (HPPC) and the intermediary i.e. Solar Energy Corporation of India Limited (SECI) as well as clause 4.4.1 of the back to back Power Purchase Agreement (PPA) dated 27.12.2017 entered into between M/s. Nani Virani Wind Energy Private Limited (Wind Power Developer or WPD) and SECI. The PSA provides that the PPAs shall become integral part of this agreement.

Article 6.8.3 of the PSA provides as under:-

"The WPD will declare the CUF of the Project and will be allowed to revise the same once within first year of COD. HPPC, in any Contract Year, shall not be obliged to purchase any additional energy from the SECI/WPD beyond 911.92 Million kWh (MU). If for any Contract Year, it is found that the WPD has not been able to generate minimum energy of 683.94 Million kWh (MU) WPD shall be liable to pay only such compensation at the rate decided by the State Electricity Regulatory Commission on HPPC for such shortfall in meeting of the RPOs and shall duly pay such compensation to SECI to enable SECI to remit the amount to HPPC. This compensation shall be proportional to the amount of shortfall in wind energy during the Contract Year. WPD shall maintain generation so as to achieve CUF not less than 90% of their declared CUF value and not more than 120% of their declared CUF value during PPA duration of 25 years. The lower limit will, however be relaxable by SECI to the extent of grid non availability for evacuation which is beyond the control of the developer. The CUF will be calculated every year from 1st April of the year to 31st March next year."

(Emphasis supplied)

Similarly, Article 4.4.1 of the PPA provides as under:-

“The Developer will declare the CUF of the Project and will be allowed to revise the same once within first year of COD. Buyer, in any Contract Year, shall not be obliged to purchase any additional energy from the WPD beyond 178.704 Million kWh (MU). If for any Contract Year, it is found that the WPD has not been able to generate minimum energy of 134.028 Million kWh (MU), WPD shall be liable to pay the compensation provided in the PSA as payable to Buying Entity(ies) by Buyer to enable Buyer to remit the amount to Buying Entity (ies). This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be equal to the compensation payable by the Buying Entity(ies) towards non-meeting of their RPOs. WPD shall maintain generation so as to achieve CUF not less than 90% of their declared CUF value and not more than 120% of their declared CUF value during PPA duration of 25 years. The lower limit will, however be relaxable by Buyer to the extent of grid non availability for evacuation which is beyond the control of the developer. The CUF will be calculated every year from 1st April of the year to 31st March next year.”
(Emphasis supplied)

17. From the combined reading of the provisions of Section 79 (1), 86 (1), judgements cited above and provisions of Article 4.4.1 of the PPA as well as Article 6.8.3 of the PSA, leaves no iota of doubt that under the composite scheme for sale of electricity in more than one State, the power to adjudicate the disputes vests upon the Central Electricity Regulatory Commission. However, Article 6.8.3 of the PSA read with Article 4.4.1 of the PPA, has expressly conferred limited jurisdiction upon this Commission regarding deciding the rate at which compensation is payable to HPPC for shortfall in meeting RPO due to shortfall in generation by WPD. This jurisdiction to determine the rate is subject to further adjudication by Hon'ble CERC under Section 79 (1) of the Electricity Act, 2003. It may not be open to this Commission even donning the garb of a regulatory body to go beyond the express terms of the contract.
18. Accordingly, in exercise of its limited jurisdiction to decide the rate at which compensation is payable to HPPC for shortfall in meeting its RPO, the Commission has taken note of the averments of the respondent (s) that as per ARR order of this Commission dated 05.03.2024 for the FY 2022-23 (HERC/Petition No. 69 of 2023 and HERC/Petition No. 70 of 2023), the DISCOMS were surplus in their RPO. Article 4.4.1 of the PPA has expressly provided that “the amount of compensation shall be equal to the compensation payable by the Buying Entity(ies) towards non-meeting of their RPOs”. The corresponding Article 6.8.3 of the PSA, provides that the compensation rate shall be decided by the State Electricity Regulatory Commission for shortfall in meeting

of the RPOs by HPPC. Thus, in the absence of RPO deficit, it does not stand to logic that the petitioner should insist for determination of compensation rate under Article 6.8.3 of the PSA read with Article 4.4.1 of the PPA. On this limited issue and notwithstanding the fact that shortfall in generation & supply of minimum guaranteed power by WPD is breach of duly executed contract, the Commission find this submission of the HPPC totally irrational, the same deserves to be rejected. Consequently, there does not arise any occasion for the Commission to examine the other issues raised by the parties herein w.r.t. the 'Force Majure Events', 'Contract year', 'delay in achieving CoD by WPD' etc.

19. Having held that the generating station of the WPD has a composite scheme for supply of power in more than one State under Section 79(1)(b) of the Act, the Commission is of the view that the "Appropriate Commission" in terms of Article 1.1 of the PPA and PSA is the Central Commission to deal with the claims/disputes raised by the petitioner on account of shortfall in generation & supply of minimum guaranteed power by WPD under the PSA dated 13.12.2017 read with PPA dated 27.12.2017.
20. In terms of the above order, the present petition is disposed of.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 09.04.2025.

Date: 09.04.2025
Place: Panchkula

(Mukesh Garg)
Member

(Nand Lal Sharma)
Chairman