

- 2.1. It is submitted that the Commission in exercise of the powers conferred under Sections 61, 66, 86(1)(e), and 181 of the Electricity Act, 2003 has notified the GERC (Procurement of Energy from Renewable Sources) Regulations, 2010 and has specified the minimum percentage for procurement of power from Wind, Solar, Biomass, Bagasse and Other Sources for promotion of sale of power from renewable energy sources and for procurement of energy from renewable sources by distribution licensee within the State of Gujarat.
- 2.2. It is further submitted that the Commission vide GERC (Procurement of Energy from Renewable Sources) (First Amendment) Regulations, 2014 prescribed the minimum percentage of procurement of power from renewable energy up to FY 2016-17 and thereafter issued the Second Amendment Regulations, 2018 wherein the following RPO trajectory is prescribed:

	Wind (%)	Solar (%)	Others (Biomass, Bagasse, MSW, etc.) (%)	Total (%)
2017-18	7.75	1.75	0.50	10.00
2018-19	7.95	4.25	0.50	12.70
2019-20	8.05	5.50	0.75	14.30
2020-21	8.15	6.75	0.75	15.65
2021-22	8.25	8.00	0.75	17.00

- 2.3. It is also submitted that the Commission vide its letter dated 18.03.2017 referring to the bidding process being followed in the country for wind and solar power directed that the distribution licensee may follow competitive bidding under Section 63 of the Electricity Act, 2003 or the bidding process followed by SECI/MNRE and in such cases, the tariff rate determined by the Commission is to be considered as ceiling rate and distribution licensee may approach for adoption of such tariff.
- 2.4. It is further stated that the Ministry of Power vide its resolution dated 03.08.2017 has issued the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects which have been amended from time to time on 15.06.2018, 07.01.2019, 11.07.2019, 22.10.2019 and lastly on 25.09.2020.

2.5. It is submitted that the Commission vide its Order dated 20.11.2018 in Petition No. 1744 of 2018 has approved the deviations in respect of 'Payment Security Mechanism' and 'Bid Responsiveness' and that the Petitioner will continue with the respective changes already approved by the Commission in the aforesaid Order.

2.6. It is submitted that apart from the above approved deviations, the Petitioner is now seeking deviations in respect of following in relation to bidding documents pursuant to amendments in the Guidelines:

- (i) 'PPA: Force Majeure' provisions,
- (ii) 'PPA: Change in Law' provisions and
- (iii) 'RFS and PPA: Commissioning schedule'.

2.7. It is submitted that as per the Guidelines, the Bidders are required to consider 'Force Majeure' Provisions which are reproduced below:

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5.4. Force Majeure

5.4.1. Definition of Force Majeure: A 'Force Majeure' (FM) would mean one or more of the following acts, events or circumstances or a combination of acts, events or circumstances or the consequence(s) thereof, that wholly or partly prevents or unavoidable delays the performance by the Party (The Affected Party) of its obligations under the relevant Power Purchase 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.

5.4.2. Categorization of Force Majeure Events:

5.4.2.1 Natural Force Majeure Event

- 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 if it is declared / notified by the competent State/Central Authority/Agency (as applicable), or verified to the satisfaction of Procurer;*
- b) *radioactive contamination or ionizing radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near*

the Power Project by the Affected Party or those employed or engaged by the Affected Party;

- c) the discovery of geological conditions, toxic contamination or archeological remains on the Project land that could not reasonably have been expected to be discovered through an inspection of the Project land; or*
- d) any event or circumstances of a nature analogous to any of the foregoing.*

Clause 5.4.2.2 Non-Natural Force Majeure Event

- a) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action;*
- b) Nation/State-wide strike, lockout, boycotts or other industrial disputes which are not directly and solely attributable to the actions of the Affected Party, but does not include strike or labour unrest limited to the Affected party or its contractors.*
- c) Nationalization or any compulsory acquisition by any Indian Governmental Instrumental / State Government in national interest or expropriation of any material Project assets or rights of the generator, as a result of which the Generator or its shareholders are deprived (wholly or partly) of their rights or entitlements under the Power Purchase Agreement. Provided that such action does not constitute remedies or sanctions lawfully exercised by the Procurer or any other Government Authority as a result of any breach of any of the Applicable Laws or the Applicable Permits by the generators or the Generator related parties;*
- d) action of a Government Authority having Material Adverse Effect including but not limited to change in law, only if consequences thereof cannot be dealt with under and in accordance with the provisions of Clause 5.7 of these Guidelines; any unlawful or unauthorized or without jurisdiction revocation of, or delay in, or refusal, or failure to renew or grant without valid cause, any Permits of the Generator or any of the clearance, license, authorization to be obtained by the Contractors to perform their respective obligations under the relevant PPA and/or the Project document; provided that such delay, modification, denial, refusal or revocation did not result from the Generator's or any Contractors in ability or failure to comply with any condition relating to grant, maintenance or renewal of such Permits or clearance, license, authorization, as the case may be.*

Clarification: The phrase "Change in Law" would include changes brought out through change in Law, Rules, Regulations or orders of competent authorities"

5.4.3. Force Majeure Exclusions

5.4.3.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

- a) Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;*
- b) Delay in the performance of any contractor, sub-contractor or their agents;*
- c) Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;*
- d) Strikes at the facilities of the Affected Party;*
- e) Insufficiency of finances or funds or the agreement becoming onerous to perform; and*
- f) Non-performance caused by, or connected with, the Affected Party's:
 - i. Negligent or intentional acts, errors or omissions;*
 - ii. Failure to comply with an India Law; or*
 - iii. Breach of, or default under this Agreement.**

5.4.4. Notification of Force Majeure Event

5.4.4.1. 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.

5.4.4.2. Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under the PPA. 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 weekly) reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

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

5.4.5. Performance Excused

- 5.4.5.1 *The Affected Party, to the extent rendered unable to perform its obligations or part of the obligation thereof under the PPA as a consequence of the Force Majeure Event, shall be excused from performance of the obligations, provided that the period shall not exceed 180 (one hundred and eighty) Days from the date of issuance of the FM Notice. The Parties may mutually agree to extend the period for which performance is excused due to a Force Majeure Event.*
- 5.4.5.2. *For the time period, as mutually agreed by the Parties, during which the performance shall be excused, the generator shall be entitled for a day to day extension of the period provided for Financial Closure or Scheduled Commissioning Period or the PPA period, as the case may be.*
- 5.4.5.3. *Provided always that a Party shall be excused from performance only to the extent reasonably warranted by the Force Majeure Event.*
- 5.4.5.4. *Provided further that, nothing shall absolve the Affected Party from any payment obligations accrued prior to the occurrence of the underlying Force Majeure Event.*

5.4.6. No Liability for Other Losses

Save as otherwise provided in these Guidelines, no Party shall be liable in any manner, whatsoever, to the other Parties in respect of any Loss relating to or arising out of the occurrence or existence of any Force Majeure Event.

5.4.7. Resumption of Performance

During the period that a Force Majeure Event is subsisting, the Affected Party shall, in consultation with the other Parties, make all reasonable efforts to limit or mitigate the effects of such Force Majeure event on the performance of its obligations under the PPA. The Affected Party shall also make efforts to resume performance of its obligations under this Agreement as soon as possible and upon resumption, shall notify other Parties of the same in writing. The other Parties shall afford all reasonable assistance to the Affected Party in this regard.

5.4.8. Termination Due to Force Majeure Event

5.4.8.1. Termination due to Natural Force Majeure Event

- a) *If, prior to the completion of the 180 (one hundred and eighty) Day period (or any extended period) for a Natural Force Majeure Event commencing from the date of issuance of the Force Majeure Notice, the Parties are of the reasonable view that a natural Force majeure Event is likely to continue beyond such 180 (one hundred and eighty) Day period or any extended period agreed in pursuance of Article 5.4.5 (Performance Excused); or that it is uneconomic or impractical to restore the affected Unit, then the Parties may mutually decide to*

terminate the PPA, and the termination shall take effect from the date on which such decision is taken.

- b) Without prejudice to the provisions of Article 5.4.8.1(a) above, the Affected Party shall, after expiry of the period of 180 (one hundred and eighty) Days or any other mutually extended period, be entitled to forthwith terminate the PPA in its sole discretion by issuing a notice to their effect.*
- c) On termination of the PPA pursuant to Article 5.4.8.1(b):
 - (i) no Termination Compensation shall be payable to the generator.*
 - (ii) the Generator shall be eligible for undisputed payments under outstanding Monthly Bill(s), before the occurrence of Force Majeure Event.**

Clause 5.4.8.2 Termination due to Non-Natural Force Majeure Event

- a) Upon occurrence of a Non-Natural Force Majeure Event, the Generator shall, at its discretion, have the right to terminate the PPA forthwith after the completion of the period of 180 (one hundred and eight) Days from the date of the Force Majeure Notice.*
- b) Notwithstanding anything in Article 5.4.6, on termination of the PPA pursuant to Article 5.4.8.2(a):
 - (i) the Procurer shall pay to the generator, 'Force Majeure Termination Compensation' equivalent to the amount of the Debt Due and the 110% (one hundred and ten per cent) of the Adjusted Equity, as defined in these Guidelines, and takeover the Project assets.*
 - (ii) the Generator shall be eligible for undisputed payments under outstanding Monthly Bill(s), before the occurrence of Force Majeure Event.**

.....”

2.8. It is submitted that bidders are required to consider 'Force Majeure' provisions. The said provision provided in Clause 5.4 of the guidelines is such an extensive provisions of Force Majeure Events and the termination provisions provide discretion to the generator to terminate the PPA unilaterally and requires the procurer to take over the project assets even in the absence of default on part of the procurer. These clauses provide potential exit route to the generator by transferring the project risks to the procurers and ultimately to their consumers and may give rise to circumstances wherein the generator would terminate the PPA for no default on part of procurers. Therefore, in such circumstances the interest of procurer and

ultimately of the consumers would be adversely affected as procurers will have to make termination payment which will have to be recovered through consumer tariff.

- 2.9. It is further submitted by the Petitioner that taking over of project assets and assignment/appointment of another party to maintain the performance of asset etc. are dealt with by the lenders/banks/financial institutions. Therefore, when the power procurers do not have control on financing mechanism of the generator, it becomes difficult for the procurer to ascertain the amount of debt at the time of termination. Moreover, in the present scenario when the project debts are syndicated by more than one lender/banks/financing institutions, it becomes even more difficult for the procurer to crystalize the amount of debt due. Therefore, the power procurer should not be burdened with termination payment and takeover of the project when there is no default on part of power procurer.
- 2.10. It is also submitted that as per the provisions of the draft PPA, the termination of PPA will take place only in cases of events of default and not in case of Force Majeure events. The provisions of Force majeure in the draft PPA are simple and uniform and provides relief to parties from their obligations in case of Force Majeure Events under the PPA. This also ensures operational ease and uniformity in the tie-up of upcoming solar projects by avoiding interpretation issues, disputes and litigations of Force majeure during the project implementation and operations stage. Therefore, in accordance with Clause 3.1.1 of the Guidelines dated 03.08.2017, the Petitioner is seeking approval of deviations in Clause 5.4 pertaining to Force Majeure by way of the present Petition and proposes to continue with following provisions of Force Majeure under Article 8 of the draft PPA:

“.....

ARTICLE 8: FORCE MAJEURE

8.1 Force Majeure Events & Exclusions:

8.1.1 Force Majeure Events: *Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet ,milestone dates due to any event or circumstances (a “Force majeure Event”) beyond the reasonable*

control of the Party experiencing such delay or failure, including the occurrence of any of the following:

- a) Acts of God;*
- b) Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;*
- c) Acts of war (whether declared or undeclared), invasion or civil unrest;*
- d) Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the Power Producer or TPL-D of any Law or any of their respective obligations under this Agreement);*
- e) Earthquakes, explosions, accidents, landslides, fire;*
- f) Expropriation and/or compulsory acquisition of the Project in whole or in part by Government Instrumentality;*
- g) Chemical or radioactive contamination or ionizing radiation; or*
- h) Damage to or breakdown of transmission facilities of GETCO / DISCOMs;*
- i) Exceptionally adverse weather conditions which are in excess of the statistical measure of the last hundred (100) years.*

8.1.2 Force Majeure Exclusions: *Force Majeure shall not include the following conditions, except to the extent that they are consequences of an event of Force Majeure:*

- 1. Unavailability, Late Delivery or Change in cost of plants and machineries, equipment, materials, spare parts or consumables for the project;*
- 2. Delay in performance of any contractor / sub contractor or their agents;*
- 3. Non-performance resulting from normal wear and tear experience in power generation materials and equipments;*
- 4. Strike or Labour Disturbances at the facilities of affected parties;*
- 5. Inefficiency of finances or funds or the agreement becoming onerous to perform, and*
- 6. Non-performance caused by, or concerned with, the affected party's*
 - I. Negligent and intentional acts, errors or omissions;*
 - II. Failure to comply with Indian law or Indian Directive; or*
 - III. Breach of, or default under this agreement or any Project agreement or Government agreement.*

8.1.3 *The affected Party shall give notice to other party of any event of Force Majeure as soon as reasonably practicable, but not later than 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 any event of Force Majeure results in a breakdown*

of communication rendering it not reasonable to give notice within the applicable time limit specified herein, then the party claiming Force Majeure shall give notice as soon as reasonably practicable after such reinstatement of communication, but not later than one day after such reinstatement. Such notice shall include full particulars of the event of Force Majeure, its effects on the party claiming relief and the remedial measures proposed, and 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 situation.

8.1.4 The affected Party shall give notice to the other Party of (1) cessation of relevant event of Force Majeure; and (2) 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.

8.1.5 To the extent not prevented by a Force Majeure event, the affected party shall continue to perform its obligations pursuant to this agreement. The affected party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable.

8.2 Available Relief for a Force Majeure Event:

8.2.1 No Party shall be in breach of its obligations pursuant to this agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure event. However, adjustment in tariff shall not be allowed on account of Force Majeure event.

For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under this Agreement shall be suspended or excused due to the occurrence of a Force Majeure Event in respect of such Party.

.....”

- 2.11. It is further submitted that Clause 5.7 of the Guidelines stipulates inclusion of following 'Change in Law' provision in the bidding document.

“.....

5.7. CHANGE IN LAW

5.7.1. In the event a Change in Law results in any adverse financial loss / gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator / Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism

of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.

5.7.2. In these Guidelines, the term Change in Law shall refer to the occurrence of any of the following events after the last date of the bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes which have a direct effect on the Project. However, Change in law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends.

.....”

- 2.12. It is submitted that the ‘Change in Law’ provisions in the amended Guidelines is too wide creating probability for seeking frequent tariff revisions and consequently results into uncertainty of tariff. The evaluation of effect of ‘Change in Law’ would require detailed verification and scrutiny of the capital cost of the project and different parameters/criteria considered by the generator for the project on the bid submission date over which the procurer has no control. This could lead to excessive litigations and complication among the parties. This would vitiate the basic objective of certainty of tariff over the PPA tenure determined through competitive bidding process since any ‘Change in Law’ affecting the inputs / components of the project could affect different generators differently.
- 2.13. It is also submitted that the aforesaid Clause in proposed to be modified to provide for ‘Change in Law’ in the nature of additional tax, duty, cess etc. only on generation of electricity (leviable on the final output in the form of energy) or sale of electricity to be pass through. Any ‘Change in Law’ which directly affects sale of electricity can be evaluated easily and allowed as a pass-through without explicitly getting into the basis considered by the Bidder while quoting tariff.
- 2.14. It is further submitted that based on industry feedback, there is a likelihood of variation in import duties on solar equipment in future years. Such import duties may not be only in the form of anti-dumping and/or safeguard duty but also in the form of custom duty/import duty on solar equipment. Therefore, to ensure larger participation by the bidders and to ensure identification of competitive price in the

bidding process, the Petitioner proposes to make necessary amendments in the clause pertaining to 'Change in Law'.

2.15. It is also submitted that, it is imperative to ensure reasonableness of the 'Change in Law' pertaining to DC capacity since developers may install excess solar panels to get higher CUF. Therefore, the Petitioner has proposed to cap DC capacity of Solar Panel @ 150% of contracted AC capacity for the purpose of ensuring reasonableness of 'Change in Law' relief under the PPA.

2.16. The Petitioner is accordingly seeking the approval for deviations from Clause 5.7 of the Guidelines pertaining to 'Change in Law' by proposing amended Article 9 of the PPA as under:

“.....

ARTICLE 9: CHANGE IN LAW

9.1 Definition

9.1.1 *“Change in Law” shall refer to the occurrence of any of the following events after the Bid Deadline:*

- a. *the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulations, notice, circular, code, rule or direction by Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties charges, levies etc. that results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on the generation of electricity (leviable in the final output in the form of energy) or sale of electricity.*

For avoidance of doubt, it is clarified that any change in taxes or surcharge or cess or similar charges on inputs like material, labour or any other input for setting up the Project will not be allowed under Change in Law except as specified in 9.1.1(b)

- b. *Introduction/modification/changes in the rates of any taxes/duties/cess/surcharge or similar charges on import of solar power equipment or parts thereof which has direct effect on the Project cost.*

9.2 Relief for Change in Law

9.2.1 *In case Change in Law on account of 9.1.1 (a) above results in decrease or increase by one percent (1%) in the estimated revenue from the Electricity*

for the Contract Year for which such adjustment becomes applicable or more, during Operation Period, the tariff payment to the Power producer shall be appropriately increased or decreased with due approval of GERC.

9.2.2 In case of Change in Law resulting on account of 9.1.1 (b) above, the Power Producer shall be allowed an increase / decrease in tariff of 1 paise / unit for every increase / decrease of Rs. 2 lakh per MW of project capacity (AC) in the Project Cost which shall be allowed upon submission of proof of payment made by the Power Producer towards any taxes / duties / cess / surcharge or similar charges on import of solar power equipment or parts thereof to the concerned Authority and with due approval of GERC. This increase / decrease in tariff due to this change in cost of PV modules shall be limited to actual DC capacity or 150% (One hundred & fifty percent) of contracted AC capacity whichever is lower.

9.2.3 The Power Procurer or the Power Producer, as the case may be, shall provide the other Party with a certificate stating that the adjustment in the Tariff Payment is directly as a result of the Change in Law and shall provide supporting documents to substantiate the same and such certificate shall correctly reflect the increase or decrease in costs.

9.2.4 The revised tariff shall be effective from the date of such change in Law as approved by GERC.

...”

2.17. It is further submitted that as per the latest amendment in Clause 14.3 of the Guidelines, PPA for balance capacity not commissioned by SCOD plus Six (6) months shall be terminated without any consideration whatsoever. The relevant portion of the Guidelines is reproduced below:

“.....

14.3 Commissioning Schedule:

(i) The projects shall be commissioned within a period of 15 (fifteen) months from the date of execution of the PPA, for projects specified to be set up in Solar park, and within a period of 18 (eighteen) months from the date of execution of the PPA, for projects not specified to be set up in Solar park. However, if for some reason, the scheduled commissioning period needs to be kept smaller than that provided in these Guidelines, the Procurer can do the same. Subject to clause no. 5.4 of these Guidelines, delay in commissioning, beyond the Scheduled Commissioning Period shall involve penalties, on the Solar Power Generator, as detailed below:

(a) For Delay in commissioning upto 6 (Six) months from SCD, encashment of Performance Guarantee (PG) on per day basis and proportionate to the capacity not commissioned.

(b) For Delay in commissioning beyond six months from SCD, Generator Event of Default, as per clause 5.6.1 of these Guidelines shall be considered to have occurred and the contracted capacity shall stand reduced to the project capacity commissioned upto SCD + 6 (six) months. The PPA for the balance capacity not commissioned shall be terminated.

(ii)

(iii) It is presumed that in terms of Clause 10.4 of these Guidelines, the tariff will be adopted by the Appropriate Commission within 60 days of such submission. However, notwithstanding anything contained in these Guidelines, any delay in adoption of tariff by the Appropriate Commission, beyond 60 (sixty) days, shall entail a corresponding extension in scheduled commissioning date.”

.....”

2.18. It is submitted that the carrying out long term competitive bidding is a long drawn and time consuming process and having discovered the competitive rates for supply of power to meet renewable power purchase obligation of the licensee, it would be counter-productive to terminate un-commissioned capacity as the Petitioner would have to once again repeat the entire process. Hence, in light of various uncertainties impacting the project and in the interest of the licensee and its consumers, it would not be appropriate to mandate the Petitioner to terminate the balance capacity not commissioned by SCOD but discretion needs to be provided to the Petitioner to assess the ground reality and decide as to continue with the PPA or terminate the balance capacity. Accordingly, the Petitioner has proposed to incorporate suitable commercial mechanism to continue with the balance capacity at its discretion in case of delay in the COD of balance capacity beyond six months from SCOD.

2.19. Accordingly, the Petitioner in terms of above has sought approval for deviation from Clause 14.3 of the Guidelines and has proposed to carry out changes in this regard in both PPA and RfS by incorporating the amended Clause of the RfS and PPA, which reads as under:

RfS

3.11.3 Penalty for Delay in Commissioning: The Project shall be commissioned upto the SCOD. Consequences of non-achievement of Project Commissioning on or before SCOD except due to the Force Majeure Event as per the terms of the PPA or due unavailability of transmission system for reason solely attributable to STU-GETCO/CTU, are as follows:

i. Delay upto six (6) months from SCOD: TPL will encash Performance guarantee on per day basis and proportionate to the balance Capacity not commissioned

[e.g. for a Project of 100 MW capacity, if commissioning of 40 MW capacity is delayed by 30 days from the SCOD, then the penalty shall be: PG amount X (40/100) X (30/180).]

ii. For delay in commissioning beyond 6 (six) months from SCOD: For Delay in commissioning beyond 6 (six) months from SCOD, Generator Event of Default as per Clause 10.2.1 of the PPA, shall be considered to have occurred to have occurred TPL will have sole discretion of reducing the project capacity commissioned upto SCOD + 6 (six) months and terminate the PPA for the balance capacity. However, TPL may allow further extension for commissioning of the Project subject to mutual discussion & bidder's concurrence to comply with the appropriate commercial mechanism as may be required by the Procurer

In addition, if the Commissioning of the Project or part thereof is delayed beyond the start date of grant of transmission open access, then transmission charges should be borne by Successful Bidder till COD of the last Unit for the capacity not commissioned.

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

Any delay in adoption of tariff by the Hon'ble GERC beyond 60 (Sixty) days from date of filing of petition by TPL shall entail a corresponding extension in SCOD.

For the purpose of calculations for penalty, the month shall be considered consisting of 30 days.

PPA

3.3 Liquidated Damages for delay in Commissioning the Project beyond Scheduled Commercial Operation Date (SCOD)

The Project shall be commissioned upto Scheduled Commercial Operation Date. The Power Producer shall have to submit Commissioning Certificate as verified inspected and certified by GEDA. Consequences of non-achievement of Project Commissioning on or before SCOD Except due to the Force Majeure Event as per the terms of the PPA or due to unavailability of transmission system for reason solely attributable to STU-GETCO/CTU, are as follows:

- i. **Delay upto six (6) months from SCOD:** TPL-D will encash Performance Guarantee on per day basis and proportionate to the balance Capacity not commissioned:

[e.g. for a Project of 100 MW capacity, if commissioning of 40 MW capacity is delayed by 30 days from the SCOD, then the penalty shall be: PG amount X (40/100) X (30/180).]

- ii. **For delay in commissioning beyond 6 (six) months from SCOD:** For Delay in commissioning beyond 6 (six) months from SCOD, Generator Event of Default as per Clause 10.2.1 of the PPA, shall be considered to have occurred. TPL will have sole discretion of reducing the project capacity commissioned upto SCOD + 6 (six) months and terminate the PPA for the balance capacity. However, TPL may allow the further extension to mutual discussion & bidder's concurrence to comply with the appropriate commercial mechanism as may be required by the Procurer

In addition, if the Commissioning of the Project or part thereof is delayed beyond the start date of grant of transmission open access, then transmission charges should be borne by Successful Bidder till COD of the last Unit for the capacity not commissioned.

In the event of termination of PPA or part thereof, any damages or charges payable to the STU/CTU, for the Open Access of the Project shall be borne by the Power Producer.

Any delay in adoption of tariff by the Honourable GERC beyond 60 (Sixty) days from date of filing of petition by TPL-D shall entail a corresponding extension in SCOD.

For the purpose of calculations for Liquidated Damages, the month shall be considered consisting of 30 days.

2.20. Subsequently, the Petitioner through affidavit dated 15.01.2021 has submitted that tender dated 23.12.2020 has been issued by the Petitioner for procurement of 300 MW Solar Power vide RfS No. TPL/Solar/03/2020 containing the deviations proposed and thereafter, issued an addendum to provide for additional capacity up to 300 MW under 'Greenshoe option' and has filed the draft of RFS and PPA with the proposed deviations as well as Addendum-01 dated 08.01.2021 with the present Petition.

3. The matter was heard on 28.01.2021 through virtual hearing, physical presence being not insisted on account of prevailing COVID-19 pandemic.

4. Shri Chetan Bundela, on behalf of the Petitioner Torrent Power Limited (TPL), reiterated the facts as stated above in para 2 above. He further submitted that the deviations sought by the Petitioner are genuine and valid and also in the interest of the licensee as well as the consumers at large.
- 4.1. He submitted that the Petition is filed under Clause 3.1.1(c) and Clause 18 of the Guidelines for Tariff Based Competitive Bidding Process notified by Ministry of Power, Government of India read with Section 86 of the Electricity Act, 2003 for approval of the deviations. He submitted that the Petitioner is required to purchase renewable power in order to meet RPO compliance for its distribution license area of Ahmedabad, Surat and Gandhinagar including Dholera and this Petition is specifically for procuring the Solar power.
- 4.2. He further submitted that earlier the Petitioner approached this Commission seeking approval of deviations from the aforesaid guidelines and the Commission vide its Order dated 20.11.2018 in Petition No. 1744 of 2018 has already approved two deviations qua the guidelines in respect of (i) Payment Security Mechanism and (ii) Bid responsiveness. Now, through the present Petition, the Petitioner is additionally seeking three more deviations from the provisions of the guidelines with regard to (i) 'Force Majeure', (ii) 'Change in Law' and (iii) 'Commissioning Schedule'.
- 4.3. He submitted that the 'Force Majeure' provisions of the amended guidelines are so extensive and also provide the discretion to the generator to terminate the PPA unilaterally requiring the procurer to take over the project assets even through there is no default on part of procurer. The Petitioner stated clauses for force majeure event wherein detailed provisions pertaining to all the natural and non-natural force majeure events are provided including provisions for remedy and how the entire mechanism will take place. The rationale for seeking the aforesaid amendment are also stated in the Petition.
- 4.4. He further submitted that similar amendment was also sought by GUVNL which has been approved by the Commission. Elaborating the rationale for seeking the amendment, he submitted that the bidders generally finance the project through syndication of loan through various lenders and hence, in case the procurer has to take over the project assets

funded through loans / debt from so many lenders then ultimately the Petitioner and its consumers may be put to the risk. Accordingly, the Petitioner has suggested in the proposed provisions regarding inclusions and exclusions of force majeure events and its treatment, which is simple and uniform and provides reliefs to the parties in case of occurrence of any force majeure event. Thus, the interest of the procurer as well as of the generator gets protected by making the procedure simple and thereby avoiding any future disputes and litigations. He also affirmed that the provisions and treatment regarding 'Force Majeure' proposed by the Petitioner is almost similar to the case of GUVNL

- 4.5. He submitted that the next deviation sought by the Petitioner is regarding 'Change in Law' because as per the provisions in the guidelines, it may require frequent resetting of tariff on account of any change in particular law. Moreover, the said provisions of guidelines may possibly result in uncertainty of tariff and may not provide any sanctity of competitive bidding because the generator can approach seeking appropriate reliefs for each and every change in law. He further submitted that safeguard duty is applicable as of now which may be revised in future or it may come in different form and the same may be increased or reduced or may be levied with different nomenclature like anti-dumping duty or custom duty or in some other form. Hence, in order to ensure larger participation by the bidders and discovery of competitive tariff, the Petitioner is seeking appropriate deviation in this regard. Accordingly, in order to ascertain the sanctity of tariff quoted during the bidding process, the Petitioner is proposing a simple mechanism whereby in case of any change in law which ultimately effects the output of the electricity then only upto that extent the change in law to be allowed.
- 4.6. He also submitted that the proposed clause regarding 'Change in Law' of the Petitioner is in minor variance compared to the relevant clause approved by the Commission in case of GUVNL because the Petitioner has limited the same to generation of electricity or on the final output in the form of energy i.e. solar module only. Apart from that the Petitioner has continued with the earlier provision with the project cost which is related to the import of the Solar panel parts.
- 4.7. He further submitted that in the relief clause, the Petitioner has proposed that for any change in law on the generation or sale of electricity resulting in decrease or increase by one percent of estimated revenue from the electricity then correspondingly appropriate adjustment during operation period becomes applicable through increase or decrease in the tariff payment. However, in case of any change in law with regard to taxes/duties on

import of solar power equipment or its parts having direct effect on the project cost, the adjustment to be made in the tariff by one paise per unit for every increase / decrease of two lacs per MW of the project capacity (AC) in the project cost. Thus, if there is any increase then tariff to be increased and vice versa. It means that incase the project cost goes up by two lac rupees per MW then correspondingly one paise per unit increase to be given in the tariff. Similarly in case of decrease of project cost reduction in tariff to be given. He also submitted that there is minor change in terms of the language in the proposal as compared to earlier approval in case of GUVNL.

- 4.8. He submitted that during the bidding process, the bidders are not required to provide the capital cost of the project but have to quote tariff only. Since, the procurer is concerned with the quantum of AC power whereas the bidder has the flexibility of deciding the PV modules i.e. quantum of DC power and it is observed that sometimes the bidder go for higher DC capacity. Therefore, in order to restrict such practice, the Petitioner has proposed that the increase / decrease in tariff to be limited to actual DC capacity or 150% of contracted AC capacity whichever is lower.
- 4.9. On the next issue regarding 'Commissioning Schedule' in RfS and PPA, he submitted that the Petitioner has made minor changes in the clause provided in the guidelines pertaining to commissioning schedule. He submitted that this deviation was not subject matter of the GUVNL case and is new deviation proposed by the Petitioner. He further submitted that the guidelines provide that any capacity of the PPA which is not commissioned beyond 6 months of the SCOD shall stand terminated without any consideration and hence deviation is sought whereby the procurer has the discretion of not terminating for such balance capacity and allowing extension or to terminate the balance capacity. He submitted that the purpose for seeking such deviation is that as such after long drawn process of competitive bidding and obtaining necessary approvals, if any, force majeure event occurs resulting in delay, which is genuine and beyond the control of the generator or the procurer, then based on commercial prudence it is appropriate to grant extension for completion of such part capacity. Moreover, if the tariff discovered is competitive the same needs to be considered for allowing the generator to complete the entire project.
- 4.10. He further submitted that the Petitioner has also submitted additional affidavit wherein it is apprised regarding issuance of addendum to RfS regarding the green shoe option upto 300 MW capacity, which is otherwise not a deviation and has also been included in

tenders of GUVNL and exercised in past. He explained that the clause for green shoe option provides that once the capacity for which bids are invited is allocated to successful bidders at their respective quoted tariff and corresponding capacity and thereafter, if the procurer still desires to allocate additional capacity in that case exercising the green shoe option the procurer can tie up the additional capacity by allocating the same amongst all the successful bidders in the ratio of their original capacity allocated provided the tariff quoted by L1 bidder is matched by successful bidders.

4.11. He also submitted that the rates of solar module are very volatile but currently it is observed that the rates are competitive and just to avoid any further delay & in order to take the advantage of such low rates, the Petitioner has initiated the bidding process. He submitted that submission of the bids is still pending and also the same is subject to the approval by the Commission.

4.12. He submitted that the Petitioner has already filed the relevant bidding documents and draft RfS, draft PPA and addendum are already part of the record and requested the Commission to approve the deviations sought because as such majority of the deviations sought in the present matter have already been approved by the Commission earlier in the matters filed by GUVNL.

5. Based on the submissions made by the Petitioner the issue for consideration before the Commission is regarding approval of deviations sought in the bid documents as proposed by the Petitioner for procurement of power from grid connected Solar Power Projects.

5.1. We note that after filing the Petition alongwith draft RfS and PPA, the Petitioner has issued tender dated 23.12.2020 for procurement of 300 MW Solar Power vide RfS No. TPL/Solar/03/2020 containing the deviations proposed in the present Petition. The Petitioner also issued an addendum dated 08.01.2021 to the aforesaid RfS to provide for additional capacity up to 300 MW under greenshoe option and has filed Addendum-01 dated 08.01.2021.

5.2. It is also submitted that all the deviations sought through this Petition except the deviation from clause 14.3 of Guidelines have been earlier considered and approved by this Commission in matters filed by GUVNL and accordingly, the deviation regarding discretion to continue with the project in case of delay in commissioning

beyond six (6) months of Scheduled Commercial Operation Date (SCOD) sought by the Petitioner in the present matter qua provision of clause 14.3 in the bidding process initiated by the Petitioner is a new deviation for consideration of the Commission.

5.3. We have considered the submissions made by the Petitioner. The present Petition is filed seeking approval of the Commission for deviations from the Solar bidding guidelines dated 03.08.2017 as amended from time to time submitting that the Petitioner is required to procure renewable energy based generation in order to comply the RPO targets stipulated by the Commission. The Guidelines for Tariff Based Competitive Bidding process for procurement of power from grid connected Solar PV Power Projects are notified on 3.08.2017 by Ministry of Power under Section 63 of the Act read with Tariff Policy, 2016. The said Guidelines have been amended from time to time on 14.06.2018, 03.01.2019, 09.07.2019, 22.10.2019 and lastly on 25.09.2020. It is therefore, necessary to refer the relevant Sections of the Act, National Tariff Policy, 2016 and Clauses of the Guidelines which are reproduced hereunder:

(I) Section 63 of the Electricity Act, 2003 reads as under:

“Section 63 Determination of tariff by bidding process

Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

As per the above provision, the Appropriate Commission is required to adopt the tariff discovered through transparent process of bidding.

(II) National Tariff Policy, 2016 issued by the Ministry of Power at Section 6.4 (2) records as under:

“.....

(2) States shall endeavor to procure power from renewable energy sources through competitive bidding to keep the tariff low, except from the waste to energy plants. Procurement of power by Distribution Licensee from renewable energy sources, above the notified capacity, shall be done through competitive bidding

process, from the date to be notified by the Central Government. However, till such notification, any such procurement of power from renewable energy sources Projects, may be done under Section 62 of the Electricity Act, 2003.
.....”

As per above provision the procurement of power by the distribution licensee from renewable energy sources shall be done through competitive bidding from the date to be notified by the Central Government. However, till such notification, the same may be procured at the tariff determined by the Commission under Section 62 of the Electricity Act, 2003.

(III) The relevant provisions of the Guidelines dated 3.08.2017 are reproduced below:

(a) Clause 2.1.2 of the Guidelines dated 03.08.2017:

“2.1.2. Unless explicitly specified in these Guidelines, the provisions of these Guidelines shall be binding on the Procurer/Intermediary Procurer/End Procurer and the Authorised Representative of the Procurer. The process to be adopted in event of any deviation proposed from these Guidelines is specified in Clause 18 of these Guidelines.”

According to the above Clause, the provisions of Guidelines are binding to the procurer and if any deviations from these Guidelines is to be proposed then the process specified in Clause 18 of the Guidelines is to be followed.

(b) Clause 3.1.1 pertaining to Bid Documentation of the Guidelines dated 03.08.2017:

“.....

3.1.1 Bid Documentation

a) Prepare the bid documents in accordance with these Guidelines and Standard Bidding Documents (SBDs) [consisting of Model Request for Selection (RfS) Document, Model Power Purchase Agreement and Model Power Sale Agreement], notified by the Central Government, except as provided in sub clause (c) below.

b) Inform the Appropriate Commission about the initiation of the bidding process.

c) *Seek approval of the Appropriate Commission for deviations, if any, in the draft RfS draft PPA, draft PSA (if applicable) from these Guidelines and/ or SBDs, in accordance with the process described in Clause 18 of these Guidelines.*

(i). *However, till the time the SBDs are notified by the Central Government, for purpose of clarity, if the Procurer while preparing the draft RfS, draft PPA, draft PSA and other Project agreements provides detailed provisions that are consistent with the Guidelines, such detailing will not be considered as deviations from these Guidelines even though such details are not provided in the Guidelines.*

(ii). *Further, in case of an ongoing bidding process, if the bids have already been submitted by bidders prior to the notification of these Guidelines and/or SBDs, then if there are any deviations between these Guidelines and/or the SBDs and the proposed RfS, PPA, PSA (if applicable), the RfS, PPA and the PSA shall prevail.”*

.....”

According to the above Clause, the procurer is mandated to prepare the bid documents in accordance with the Guideline and Standard Bid Documents notified by the Central Government. It is also necessary to inform the Appropriate Commission regarding initiation of the bidding process. Further, it is also provided that in case of deviations in the draft RfS, draft PPA or draft PSA from the Guidelines and/or SBDs, an approval as provided in Clause 18 of the Guidelines is required to be obtained by the Procurer.

Also, till the SBDs are notified by the Central Government, the Procurer may prepare the draft RfS, draft PPA and draft PSA and other agreements providing detailed provisions consistent with the Guidelines and such detailing will not be considered as deviation from the Guidelines.

(c) Clause 18 of the Guidelines dated 03.08.2017:

Clause 18: Deviation from process defined in the Guidelines “In case there is any deviation from the Guidelines and/or the SBDs, the same shall be subject to approval by the Appropriate Commission. The Appropriate Commission shall approve or require modification to the bid documents within a reasonable time not exceeding 90 (ninety) days.”

The aforesaid Clause provides that if there is any deviation from the Guidelines and/or the SBDs, the same shall be subject to the approval of the Appropriate Commission and the Appropriate Commission shall either approve or require modification to the Bid Documents within 90 days.

- 5.4. Now, coming to the first deviation proposed by the Petitioner from the Guidelines as amended with respect to regarding 'Force Majeure', we note that Ministry of New and Renewable Energy vide Resolution No. 283/57/2018-GRID SOLAR dated 22.10.2019 has notified "Amendments to the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" amending various clauses of principal guidelines dated 03.08.2017 whereby Clause 5.4 of principal guidelines dated 03.08.2017 is amended vide Clause 2.5 of Notification dated 22.10.2019. It is, therefore, necessary to refer to amended clause as well as the deviations proposed by the Petitioner along with the justification/rationale given for deviation:

".....

2.5 The Para at point No. 5.4.:

"5.4. Force Majeure: The PPA shall contain provisions with regard to force majeure definitions, exclusions, applicability and available relief on account of Force Majeure, as per the industry standards."

May be read as under:

5.4. Force Majeure

5.4.1. *Definition of Force Majeure: A 'Force Majeure' (FM) would mean one or more of the following acts, events or circumstances or a combination of acts, events or circumstances or the consequence(s) thereof, that wholly or partly prevents or unavoidable delays the performance by the Party (The Affected Party) of its obligations under the relevant Power Purchase 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.*

5.4.2. Categorization of Force Majeure Events:

5.4.2.1 Natural Force Majeure Event

- 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 if it is declared / notified by the competent State/Central Authority/Agency (as applicable), or verified to the satisfaction of Procurer;*
- b) *radioactive contamination or ionizing radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party;*
- c) *the discovery of geological conditions, toxic contamination or archeological remains on the Project land that could not reasonably have been expected to be discovered through an inspection of the Project land; or*
- d) *any event or circumstances of a nature analogous to any of the foregoing.*

Clause 5.4.2.2 Non-Natural Force Majeure Event

- a) *any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action;*
- b) *Nation/State-wide strike, lockout, boycotts or other industrial disputes which are not directly and solely attributable to the actions of the Affected Party, but does not include strike or labour unrest limited to the Affected party or its contractors.*
- c) *Nationalization or any compulsory acquisition by any Indian Governmental Instrumental / State Government in national interest or expropriation of any material Project assets or rights of the generator, as a result of which the Generator or its shareholders are deprived (wholly or partly) of their rights or entitlements under the Power Purchase Agreement. Provided that such action does not constitute remedies or sanctions lawfully exercised by the Procurer or any other Government Authority as a result of any breach of any of the Applicable Laws or the Applicable Permits by the generators or the Generator related parties;*
- d) *action of a Government Authority having Material Adverse Effect including but not limited to change in law, only if consequences thereof cannot be dealt with under and in accordance with the provisions of Clause 5.7 of these Guidelines; any unlawful or unauthorized or without*

jurisdiction revocation of, or delay in, or refusal, or failure to renew or grant without valid cause, any Permits of the Generator or any of the clearance, license, authorization to be obtained by the Contractors to perform their respective obligations under the relevant PPA and/or the Project document; provided that such delay, modification, denial, refusal or revocation did not result from the Generator's or any Contractors in ability or failure to comply with any condition relating to grant, maintenance or renewal of such Permits or clearance, license, authorization, as the case may be.

Clarification: The phrase "Change in Law" would include changes brought out through change in Law, Rules, Regulations or orders of competent authorities"

5.4.3. Force Majeure Exclusions

5.4.3.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

- a) Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts or consumables for the Power Project;*
- b) Delay in the performance of any contractor, sub-contractor or their agents;*
- c) Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;*
- d) Strikes at the facilities of the Affected Party;*
- e) Insufficiency of finances or funds or the agreement becoming onerous to perform; and*
- f) Non-performance caused by, or connected with, the Affected Party's:
 - i. Negligent or intentional acts, errors or omissions;*
 - ii. Failure to comply with an India Law; or*
 - iii. Breach of, or default under this Agreement.**

5.4.4. Notification of Force Majeure Event

5.4.4.1. 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.

5.4.4.2. Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under the PPA. 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 weekly) reports on the

progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

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

5.4.5. Performance Excused

- 5.4.5.1 *The Affected Party, to the extent rendered unable to perform its obligations or part of the obligation thereof under the PPA as a consequence of the Force Majeure Event, shall be excused from performance of the obligations, provided that the period shall not exceed 180 (one hundred and eighty) Days from the date of issuance of the FM Notice. The Parties may mutually agree to extend the period for which performance is excused due to a Force Majeure Event.*
- 5.4.5.2. *For the time period, as mutually agreed by the Parties, during which the performance shall be excused, the generator shall be entitled for a day to day extension of the period provided for Financial Closure or Scheduled Commissioning Period or the PPA period, as the case may be.*
- 5.4.5.3. *Provided always that a Party shall be excused from performance only to the extent reasonably warranted by the Force Majeure Event.*
- 5.4.5.4. *Provided further that, nothing shall absolve the Affected Party from any payment obligations accrued prior to the occurrence of the underlying Force Majeure Event.*

5.4.6. No Liability for Other Losses

Save as otherwise provided in these Guidelines, no Party shall be liable in any manner, whatsoever, to the other Parties in respect of any Loss relating to or arising out of the occurrence or existence of any Force Majeure Event.

5.4.7. Resumption of Performance

During the period that a Force Majeure Event is subsisting, the Affected Party shall, in consultation with the other Parties, make all reasonable efforts to limit or mitigate the effects of such Force Majeure event on the performance of its obligations under the PPA. The Affected Party shall also make efforts to resume performance of its obligations under this Agreement as soon as possible and upon resumption, shall notify other Parties of the same in writing. The other Parties shall afford all reasonable assistance to the Affected Party in this regard.

5.4.8. Termination Due to Force Majeure Event

5.4.8.1. Termination due to Natural Force Majeure Event

- a) *If, prior to the completion of the 180 (one hundred and eighty) Day period (or any extended period) for a Natural Force Majeure Event commencing from the date of issuance of the Force Majeure Notice, the Parties are of the reasonable view that a natural Force majeure Event is likely to continue beyond such 180 (one hundred and eighty) Day period or any extended period agreed in pursuance of Article 5.4.5 Performance Excused); or that it is uneconomic or impractical to restore the affected Unit, then the Parties may mutually decide to terminate the PPA, and the termination shall take effect from the date on which such decision is taken.*
- b) *Without prejudice to the provisions of Article 5.4.8.1(a) above, the Affected Party shall, after expiry of the period of 180 (one hundred and eighty) Days or any other mutually extended period, be entitled to forthwith terminate the PPA in its sole discretion by issuing a notice to their effect.*
- c) *On termination of the PPA pursuant to Article 5.4.8.1(b):*
 - (i) *no Termination Compensation shall be payable to the generator.*
 - (ii) *the Generator shall be eligible for undisputed payments under outstanding Monthly Bill(s), before the occurrence of Force Majeure Event.*

Clause 5.4.8.2 Termination due to Non-Natural Force Majeure Event

- a) *Upon occurrence of a Non-Natural Force Majeure Event, the Generator shall, at its discretion, have the right to terminate the PPA forthwith after the completion of the period of 180 (one hundred and eight) Days from the date of the Force Majeure Notice.*
- b) *Notwithstanding anything in Article 5.4.6, on termination of the PPA pursuant to Article 5.4.8.2(a):*
 - (i) *the Procurer shall pay to the generator, 'Force Majeure Termination Compensation' equivalent to the amount of the Debt Due and the 110% (one hundred and ten per cent) of the Adjusted Equity, as defined in these Guidelines, and takeover the Project assets.*
 - (ii) *the Generator shall be eligible for undisputed payments under outstanding Monthly Bill(s), before the occurrence of Force Majeure Event.*

.....”

As against above provisions of amended Clause 5.4 of the guidelines, the Petitioner has sought deviation by proposing to continue with the provisions of Force Majeure as per Article 8 of the draft PPA as under:

“.....

ARTICLE 8: FORCE MAJEURE

8.1 Force Majeure Events & Exclusions:

8.1.1 Force Majeure Events: *Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet ,milestone dates due to any event or circumstances (a “Force majeure Event”) beyond the reasonable control of the Party experiencing such delay or failure, including the occurrence of any of the following:*

- a) Acts of God;*
- b) Typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;*
- c) Acts of war (whether declared or undeclared), invasion or civil unrest;*
- d) Any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the Power Producer or TPL-D of any Law or any of their respective obligations under this Agreement);*
- e) Earthquakes, explosions, accidents, landslides, fire;*
- f) Expropriation and/or compulsory acquisition of the Project in whole or in part by Government Instrumentality;*
- g) Chemical or radioactive contamination or ionizing radiation; or*
- h) Damage to or breakdown of transmission facilities of GETCO / DISCOMs;*
- i) Exceptionally adverse weather conditions which are in excess of the statistical measure of the last hundred (100) years.*

8.1.2 Force Majeure Exclusions: *Force Majeure shall not include the following conditions, except to the extent that they are consequences of an event of Force Majeure:*

- 1. Unavailability, Late Delivery or Change in cost of plants and machineries, equipment, materials, spare parts or consumables for the project;*
- 2. Delay in performance of any contractor / sub contractor or their agents;*

3. *Non-performance resulting from normal wear and tear experience in power generation materials and equipments;*
4. *Strike or Labour Disturbances at the facilities of affected parties;*
5. *Inefficiency of finances or funds or the agreement becoming onerous to perform, and*
6. *Non-performance caused by, or concerned with, the affected party's*
 - I. *Negligent and intentional acts, errors or omissions;*
 - II. *Failure to comply with Indian law or Indian Directive; or*
 - III. *Breach of, or default under this agreement or any Project agreement or Government agreement.*

8.1.3 *The affected Party shall give notice to other party of any event of Force Majeure as soon as reasonably practicable, but not later than 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 any event of Force Majeure results in a breakdown of communication rendering it not reasonable to give notice within the applicable time limit specified herein, then the party claiming Force Majeure shall give notice as soon as reasonably practicable after such reinstatement of communication, but not later than one day after such reinstatement. Such notice shall include full particulars of the event of Force Majeure, its effects on the party claiming relief and the remedial measures proposed, and 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 situation.*

8.1.4 *The affected Party shall give notice to the other Party of (1) cessation of relevant event of Force Majeure; and (2) 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.*

8.1.5 *To the extent not prevented by a Force Majeure event, the affected party shall continue to perform its obligations pursuant to this agreement. The affected party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable.*

8.2 Available Relief for a Force Majeure Event:

8.2.1 *No Party shall be in breach of its obligations pursuant to this agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure event. However, adjustment in tariff shall not be allowed on account of Force Majeure event.*

For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under this Agreement shall

be suspended or excused due to the occurrence of a Force Majeure Event in respect of such Party.

.....”

- 5.5. Clause 5.4 of the principal guidelines provided that various provisions with regard to force majeure definitions, exclusions, applicability and available relief on account of Force Majeure in the PPA to be as per the industry standards. However, vide Clause 2.5 of the above referred amendment dated 22.10.2019 detailed provisions relating to Force Majeure like definition of Force Majeure, Categorization of Force Majeure Events in Natural and Non-Natural Event, Force Majeure Exclusions, Notification of Force Majeure Event, Performance excused, No Liability for other losses, Resumption of Performance and Termination due to Natural and Non-Natural Force Majeure Event are incorporated in the amended guidelines.
- 5.6. We note that the Petitioner is seeking deviations from the amended provisions of ‘Force Majeure’ and proposing to allow the provisions mentioned under Article 8 of draft PPA of the Petitioner as cited above.
- 5.7. We note that as per Clause 5.4 of pre-amended guidelines stated that the PPA shall contain provisions with regard to force majeure definitions, exclusions, applicability and available relief on account of Force Majeure, as per the industry standards. Now as per amended guidelines elaborate provisions pertaining to Force Majeure are included in guidelines, which as per Petitioner’s submissions are so extensive in nature and the termination provisions provide discretion to the generator to terminate the PPA unilaterally and require the procurer to take over the project assets even in absence of default on part of the procurer. According to Petitioner the amended provisions provide potential exit route to the generator by transferring the project risks to the procurers and ultimately to their consumers and may give rise to circumstances wherein the generator would terminate the PPA for no default on part of procurers. In such circumstances the interest of procurers and ultimately of the consumers be adversely affected as the procurers will have to make termination payment which will have to be recovered through consumer tariff.
- 5.8. We note that the Petitioner has under ‘Article 1: Definitions’ of the draft PPA mentioned that ‘Force Majeure’ shall have the meaning set forth in Article 8. Clause 5.4.1 of the amended guidelines has defined Force Majeure to mean one or more of

the acts, events or circumstances or a combination of acts, events or circumstances or the consequence(s) thereof, that wholly or partly prevents or unavoidable delays the performance by the Party (The Affected Party) of its obligations under the relevant Power Purchase 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.

5.9. We further note that Clause 5.4.2 of guidelines categorises Force Majeure Events into Natural Force Majeure Events under Clause 5.4.2.1 and Non-Natural Force Majeure Events under Article 5.4.2.2. The Petitioner under Article 8.1 of the PPA, has listed out the Force Majeure Events without categorising them. We note that the Petitioner has broadly incorporated Natural Force Majeure Events as detailed under Clause 5.4.2.1 of the guidelines under clause (a), (b), (e) and (g) of Article 8.1.1 of draft PPA. We further note that clause (i) of Article 8.1.1 of the Petitioner's PPA considers exceptionally adverse weather condition which are in excess of the statistical measure of the last hundred (100) years as a Force Majeure event. Clause 5.4.2.1.(d) of the guidelines provides that any events or circumstances of a nature analogous to Clause 5.4.2.1 (a) to (c) to be Natural Force Majeure Event. As per this clause any event or circumstances which are similar or analogous in nature to those specified in Clause 5.4.2.1 (a) to (c) will fall in category of Natural Force Majeure Event. Thus, the said clause encompasses all such events and circumstances which are analogous in nature to preceding three clauses whereby ambit of said clause is very wide. Therefore, we are of the view that the aforementioned clause (a), (b), (e), (g) and (i) of Article 8.1.1 of draft PPA broadly cover Natural Force Majeure Events provided under Clause 5.4.2.1 of the guidelines.

5.10. In so far as Non Natural Force Majeure Event is concerned, the Petitioner submitted that provisions under Clause 5.4.2.2 of the guidelines are very extensive and have a very wide scope. It is therefore necessary to examine the said provisions as under:

(i). Clause 5.4.2.2.(a) of the guidelines provides that any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action be considered as Non Natural Force Majeure Event. We note that Clause (c)

of Article 8.1.1 of Petitioner's draft PPA broadly covers these events as Force Majeure.

- (ii). Clause 5.4.2.2.(b) of the guidelines provides that nation/state-wide strike, lockout, boycotts or other industrial disputes which are not directly and solely attributable to the actions of the Affected Party excluding strike or labour unrest limited to the Affected Party or its contractors be considered as Non Natural Force Majeure Event. We note that the said provision is very wide in nature because nation/state-wide strike, lockout, boycotts or other industrial disputes not directly and solely attributable to the actions of the Affected Party can arise on account of various factors.

- (iii). Clause 5.4.2.2.(c) of the guidelines provides that nationalisation or any compulsory acquisition by any Indian Governmental Instrumentality / State Government in national interest or expropriation of any material Project assets or rights of the Generator, as a result of which the Generator or its shareholders are deprived (wholly or partly) of their rights or entitlements under the Power Purchase Agreement. Provided that such action does not constitute remedies or sanctions lawfully exercised by the Procurer or any other Government Authority as a result of any breach of any of the Applicable Laws or the Applicable Permits by the Generator or the Generator related parties. We note that Clause (f) of Article 8.1.1 of Petitioner's draft PPA broadly recognises expropriation and/or compulsory acquisition of the Project in whole or in part by Government Instrumentality as Force Majeure whereas; as per the relevant clause of the guidelines, if the Generator or its shareholders are wholly or partly deprived of their rights or entitlements under the Power Purchase Agreement with procurer on account of Nationalisation or compulsory acquisition by any Indian Governmental Instrumentality or State Government in national interest or expropriation of any material project assets or rights of the Generator it will qualify as Non Natural Force Majeure Event. Thus, the relevant clause of the Petitioner's draft PPA in general covers the aspect regarding nationalisation or compulsory acquisition by any Indian Governmental Instrumentality / State Government in national interest or expropriation of any material Project assets or rights of the Generator qua the provision of the guidelines.

(iv). Clause 5.4.2.2.(d) of the guidelines provides that action of a Government Authority having Material Adverse Effect including but not limited to change in law, only if consequences thereof cannot be dealt with under and in accordance with the provisions of Clause 5.7 of the Guidelines; any unlawful or unauthorised or without jurisdiction revocation of, or delay in, or refusal, or failure to renew or grant without valid cause, any Permits of the Generator or any of the clearance, licence, authorization to be obtained by the Contractors to perform their respective obligations under the relevant PPA and/or the Project Documents; provided that such delay, modification, denial, refusal or revocation did not result from the Generator's or any Contractors inability or failure to comply with any condition relating to grant, maintenance or renewal of such Permits or clearance, licence, authorization, as the case may be. We note that the ambit of this Clause is so broad that not only any action having material adverse effect including change in law of Government Authority which cannot be addressed in accordance with provisions of 'Change in Law', but any refusal or failure to renew or grant without valid cause, any permits of the Generator or any of the clearance, licence, authorization to be obtained by the Contractors required for performance of their respective obligations under the relevant PPA and/or the Project Documents provided that such delay, modification, denial, refusal or revocation is not attributable to Generator's or any Contractors to be considered as Non Natural Force Majeure Event.

5.11. We note that as far as Clause 5.4.3. of the amended guidelines is concerned, the provisions under Article 8.1.2 of draft PPA are quite similar and also provisions under Clause 5.4.4 are broadly covered under Article 8.1.3 and Article 8.1.4 of the draft PPA of the Petitioner.

5.12. Moreover, it is equally important to have a holistic view of the matter and therefore, apart from what constitutes Force Majeure, it is also necessary to refer the provisions regarding termination due to Force Majeure Event as per Clause 5.4.8 of the amended guidelines which reads as under:

“.....

5.4.8. Termination Due to Force Majeure Event

5.4.8.1. Termination due to Natural Force Majeure Event

- a) *If, prior to the completion of the 180 (one hundred and eighty) Day period (or any extended period) for a Natural Force Majeure Event commencing from the date of issuance of the Force Majeure Notice, the Parties are of the reasonable view that a Natural Force Majeure Event is likely to continue beyond such 180 (one hundred and eighty) Day period or any extended period agreed in pursuance of Article 5.4.5 (Performance Excused); or that it is uneconomic or impractical to restore the affected Unit, then the Parties may mutually decide to terminate the PPA, and the termination shall take effect from the date on which such decision is taken.*
- b) *Without prejudice to the provisions of Article 5.4.8.1(a) above, the Affected Party shall, after the expiry of the period of 180 (one hundred and eighty) Days or any other mutually extended period, be entitled to forthwith terminate the PPA in its sole discretion by issuing a notice to that effect.*
- c) *On termination of the PPA pursuant to Article 5.4.8.1(b):*
 - (i) *no Termination Compensation shall be payable to the generator.*
 - (ii) *the Generator shall be eligible for undisputed payments under outstanding Monthly Bill(s), before the occurrence of Force Majeure Event.*

5.4.8.2 Termination due to Non-Natural Force Majeure Event

- a) *Upon occurrence of a non-Natural Force Majeure Event, the Generator shall, at its discretion, have the Right to terminate the PPA forthwith after the completion of the period of 180 (one hundred and eighty) Days from the date of the Force Majeure Notice.*
- b) *Notwithstanding anything in Article 5.4.6 on termination of the PPA pursuant to Article 5.4.8.2 (a):*
 - (i) *the Procurer shall pay to the Generator, 'Force Majeure Termination Compensation' equivalent to the amount of the Debt Due and the 110% (one hundred and ten per cent) of the Adjusted Equity, as defined in these Guidelines, and takeover the Project assets.*

(ii) the Generator shall be eligible for undisputed payments under outstanding Monthly Bill(s), before the occurrence of Force Majeure Event”.

- 5.13. We have noted above that the provisions of Force Majeure Events under Clause 5.4.2 are very elaborate, wide and extensive and when read with the termination provisions under Clause 5.4.8, it emerges that termination of PPA can occur either on account of occurrence of a Natural Force Majeure event or Non-Natural Force Majeure Event in accordance to relevant provisions stated in Clause 5.4.8. In case Natural Force Majeure event has occurred and the parties are of reasonable view that the same is likely to continue beyond 180 day period or any extended period agreed in pursuance of Article 5.4.5 (Performance Excused); or that it is uneconomic or impractical to restore the affected Unit, then as per Clause 5.4.8.1.(a) above the Parties may mutually decide to terminate the PPA and the termination shall take effect from the date on which such decision is taken. Also, as per Clause 5.4.8.1.(b) even after a period of 180 days or any mutually extended period, the affected party is entitled to forthwith terminate the PPA in its sole discretion by issuing a notice to that effect. Further, as per Clause 5.4.8.2.(a) mentioned above, upon occurrence of a Non-Natural Force Majeure Event, the Generator shall, at its discretion, have the Right to terminate the PPA forthwith after the completion of the period of 180 days from the date of the Force Majeure Notice and in terms of Clause 5.4.8.2.(b).(i) the procurer shall be required to take over the project assets by paying to the Generator compensation equivalent to the amount of Debt due and 110% of Adjusted Equity.
- 5.14. We note that pursuant to occurrence of Non Natural Force Majeure Events, the Generator after 180 days of Force Majeure Notice at its discretion has the right to terminate the PPA forthwith and entitled to receive Force Majeure compensation stated above from the procurer who will be compelled to take over the project assets. Since, the Petitioner is procuring power on behalf of its subsidiary distribution companies the liability incurred will fall on distribution licensees and ultimately to the consumers. Eventually, the Petitioner will recover termination payment through tariffs. having vast scope, more particularly the thereby.
- 5.15. We note that the Petitioner has provided the clause regarding available relief for Force Majeure event whereby no party shall be in breach of its obligations under

the PPA to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure event but adjustment in tariff shall not be allowed on account of Force Majeure event. Moreover, it is also provided for avoidance of doubt that neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under the PPA shall be suspended or excused due to the occurrence of a Force Majeure Event in respect of such Party. Accordingly, as per relief clause for Force Majeure in Petitioner's PPA, no adjustment in tariff shall take place and performance of respective obligations of the parties under the PPA to the extent such performance is prevented, hindered or delayed due to a Force Majeure not to be considered as breach of its respective obligations. Also, payment obligations prior to occurrence of Force Majeure event to be suspended or excused due to occurrence of Force Majeure Event. These provisions not only appear to be simple but there is no provision regarding termination of PPA on account of Force Majeure Event.

- 5.16. According to the Petitioner the extensive provisions of Force Majeure Events readwith termination provisions provide discretion to the generator to terminate the PPA unilaterally requiring the procurer to take over the project assets without any default on part of the procurer. Such potential exit route to the generator by transferring the project risks to the procurer would not only adversely affect the interest of the procurer who will have to make termination payment but will also impact the interest of consumers since the same may have to be recovered through consumer tariff particularly when there is no default on part of procurers. Moreover, it is also submitted by the Petitioner that taking over of project assets and its assignment/appointment of another party to maintain the performance of asset etc. are dealt with by the lenders/banks/financial institutions and as such power procurer/Petitioner does not have control on financing mechanism of the generator, it becomes difficult for the procurer to ascertain the amount of debt at the time of termination. It is also submitted that in the present scenario when the project debts are syndicated by more than one lender/banks/financing institutions, it becomes even more difficult for the procurer to crystalize the amount of debt due. Therefore, the power procurer should not be burdened with termination payment and takeover of the project when there is no default on part of power procurer.

- 5.17. It is also submitted that as per the deviations sought in respect of the provisions of Force majeure in the draft PPA which are simple and uniform and provides relief to parties from their obligations in case of Force Majeure Events whereby the termination of PPA will take place only in cases of events of default and not in case of Force Majeure events. This also ensures operational ease and uniformity in the tie-up of upcoming solar projects by avoiding interpretation issues, disputes and litigations of Force majeure during the project implementation and operations stage. Therefore, in accordance with Clause 3.1.1 of the Guidelines dated 03.08.2017, the Petitioner is seeking approval of deviations in Clause 5.4 pertaining to Force Majeure by way of the present Petition
- 5.18. We further note that the Petitioner also submitted that earlier GUVNL filed Petition No. 1848 of 2019 inter alia seeking deviations regarding 'Force Majeure' provisions and the Commission in its Order dated 13.01.2020 allowed the deviations with regard to 'Force Majeure' provisions. We also note that existing bidding documents and Power Purchase Agreement has provisions regarding definition of Force Majeure, Force Majeure Events, Exclusions and Available Relief for a Force Majeure Event are provided.
- 5.19. As already noted supra that as per Article 8.2 of the PPA, no party shall be in breach of its obligations to the extent that the performance of its obligations are prevented, hindered or delayed due to a Force Majeure event and that there shall be no adjustment in tariff on account of Force Majeure. Further, we are of considered opinion that the taking over of project assets and assignment/appointment of another party, if any, to maintain and operate the said assets are matters usually dealt by lenders or banks or financial institutions.
- 5.20. We have in the past in Petition No. 1848 of 2019 vide Order dated 13.01.2020 allowed the deviations with regard to 'Force Majeure' provisions. Accordingly, we agree with the submissions of the Petitioner that provisions pertaining to Force Majeure under Clause 5.4 of the amended guidelines are extensive in nature and have vast scope. More particularly, the termination provisions provide potential exit route to the generator by transferring the project risks to the procurers and ultimately to the consumers of the licensee Petitioner and may give rise to circumstances wherein the generator would terminate the PPA for no default on

part of Petitioner and in such circumstances the interest of procurers and ultimately its electricity consumers would be adversely affected, who cannot be saddled with the obligation of taking over of projects assets as per provisions of termination under Clause 5.4.8.2 at the discretion of generator due to occurrence of Non Natural Force Majeure Events provided under Clause 5.4.2.2 of the guidelines.

5.21. In view of above, we decide to approve the deviations sought by the Petitioner from Clause 5.4 pertaining to 'Force Majeure' from the Guidelines issued by the Ministry of Power, Government of India vide Notification No. 23/27/2017-R&R dated 03.08.2017 as amended vide Resolution No. 283/57/2018-GRID SOLAR dated 22.10.2019 and allow the provisions of 'Force Majeure' under Article 8 of the draft PPA submitted with present Petition.

6. Now, we deal with the second deviation proposed by the Petitioner which relates to 'Change in Law' provisions in the guidelines. In this regard, it is necessary to refer Clause 5.7 of the Guidelines issued by the Ministry of Power, Government of India which is reproduced below:

“

5.7. CHANGE IN LAW

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

5.7.2. *In these Guidelines, the term Change in Law shall refer to the occurrence of any of the following events after the last date of the bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes which have a direct effect on the Project. However, Change in law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends.*

.....”

6.1. We note that as against the above provisions in Clause 5.7 of the Guidelines pertaining to 'Change in Law', the Petitioner is seeking the approval of deviations by proposing amendment of Article 9 of the draft PPA as under:

“.....

ARTICLE 9: CHANGE IN LAW”

9.1 Definition

9.1.1 “Change in Law” shall refer to the occurrence of any of the following events after the Bid Deadline:

a. *the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulations, notice, circular, code, rule or direction by Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties charges, levies etc. that results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on the generation of electricity (leviable in the final output in the form of energy) or sale of electricity.*

For avoidance of doubt, it is clarified that any change in taxes or surcharge or cess or similar charges on inputs like material, labour or any other input for setting up the Project will not be allowed under Change in Law except as specified in 9.1.1(b)

b. *Introduction/modification/changes in the rates of any taxes/duties/cess/surcharge or similar charges on import of solar power equipment or parts thereof which has direct effect on the Project cost.*

9.2 Relief for Change in Law

9.2.1 *In case Change in Law on account of 9.1.1 (a) above results in decrease or increase by one percent (1%) in the estimated revenue from the Electricity for the Contract Year for which such adjustment becomes applicable or more, during Operation Period, the tariff payment to the Power producer shall be appropriately increased or decreased with due approval of GERC.*

9.2.2 *In case of Change in Law resulting on account of 9.1.1 (b) above, the Power Producer shall be allowed an increase / decrease in tariff of 1 paise / unit for every increase / decrease of Rs. 2 lakh per MW of project capacity (AC) in the Project Cost which shall be allowed upon submission of proof of payment made by the Power Producer towards any taxes / duties / cess / surcharge or similar charges on import of solar power equipment or parts thereof to the*

concerned Authority and with due approval of GERC. This increase / decrease in tariff due to this change in cost of PV modules shall be limited to actual DC capacity or 150% (One hundred & fifty percent) of contracted AC capacity whichever is lower.

9.2.3 The Power Procurer or the Power Producer, as the case may be, shall provide the other Party with a certificate stating that the adjustment in the Tariff Payment is directly as a result of the Change in Law and shall provide supporting documents to substantiate the same and such certificate shall correctly reflect the increase or decrease in costs.

9.2.4 The revised tariff shall be effective from the date of such change in Law as approved by GERC.

.....”

6.2. Before we proceed with the issue regarding deviations sought in respect of ‘Change in Law’ qua the guidelines it is relevant to note that the Petitioner TPL had earlier filed Petition No. 1744 of 2018 seeking approval for deviations from the Ministry of Power (MoP) guidelines for future tenders for sourcing Solar PV power from grid connected Solar Power Projects for fulfillment of RPO of its licence areas in respect of:

- (a). Clause 5.3.1 (b): Payment Security;
- (b). Clause 5.7: Change in Law;
- (c). Clause 7.1: Bid Responsiveness.

6.3. Commission passed Order dated 20.11.2018 in above Petition No. 1744 of 2018 and approved deviations proposed by the Petitioner TPL in respect of ‘Change in Law’. The relevant paras are reproduced hereunder:

“.....

5.7. As regards the second deviation proposed by the Petitioner which relates to Change in Law, it is necessary to refer Clause 5.7 of the Guidelines issued by the Ministry of Power, Govt. of India which is reproduced below:

“.....

Clause 5.7 Change in Law -

5.7.1 In the event a change in Law results in any adverse financial loss / gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the change in Law, the Solar Power Generator / Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism

of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.

5.7.2 In these Guidelines, the term 'Change in Law' shall refer to the occurrence of the following events, after the last date of bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining a consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any taxes which have a direct effect on the Project. However, Change in Law shall not include any change in (a) taxes on corporate income or any change in any withholding tax on income or dividends; (b) Custom duty on imported equipment.

.....”

The Petitioner has sought deviation as under:

Clause Proposed by the Petitioner:

“9.1 Definition

9.1.1 “Change in Law” shall refer to the occurrence of any of the following events after the Bid Deadline.

a. The enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulations, notice, circular, code, rule or direction by Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties, charges, levies etc. that results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on the generation of electricity (leviable on the final output in the form of energy) or sale of electricity.

9.2 Relief for Change in Law

9.2.1 In case Change in Law on account of 9.1.1 (a) above results in the Power Producer’s costs directly attributable to the Project being decreased or increased by one percent (1%), of the estimated revenue from the Electricity for the Contract Year for which such adjustment becomes applicable or more, during Operation Period, the Tariff Payment to the Power Producer shall be appropriately increased or decreased with due approval of GERC.

9.2.2 *The Power Procurer or the Power Producer, as the case may be, shall provide the other Party with a certificate stating that the adjustment in the Tariff Payment is directly as a result of the Change in Law and shall provide supporting documents to substantiate the same and such certificate shall correctly reflect the increase or decrease in costs.*

9.2.3 *The revised tariff shall be effective from the date of such Change in law as approved by GERC.*

.....”

5.8. *Clause 5.7.1 of the Guidelines provides that in case of any Change in Law which results in any adverse financial loss or gain to the solar generator/procurer, they would be entitled to get compensation from the other party subject to the condition that the quantum and mechanism of compensation payment and effective date for this shall be decided by the Commission.*

5.9. *Clause 5.7.2 states about the definition of Change in Law. According to the aforesaid definition, five conditions as specified in the Clause qualify as Change in Law and also lists the exclusions under the Change in Law. The definition proposed by the Petitioner includes any Change in Law by Governmental Instrumentality or a change in interpretation by a Competent Court of law, Tribunal, Government or Statutory Authority that results in additional tax, duty, cess etc. on generation of electricity (leviable on the final output in the form of energy) or sale of electricity. Any other post-bidding increase in costs has to be risk factored by the solar generator and the same shall not be allowed as pass through unnecessarily increasing the uncertainty and burden on end consumers.*

5.10. *Relief in Change in Law is permissible when there is Change in Law as defined in Clause 9.1.1 of the PPA. Once it is established that there is a Change in Law as specified in Clause 9.1.1 of the PPA, it becomes essential to see as to whether the impact of such Change in Law results in the generator's costs directly attributable to the project being increased or decreased by 1% of the estimated revenue from the sale of electricity to the procurer for the contract year for which such adjustment becomes applicable during operation period and whether the tariff payable to the generator is to be appropriately increased or decreased. The Petitioner has proposed to make such adjustment with the approval of the Commission. We note that similar provision exists in the PPA executed by GUVNL with the successful bidders for purchase of solar power through the competitive bidding followed by e-reverse auction from grid connected SPV power projects of 500 MW. We, therefore, decide to approve the same.*

.....”

6.4. Thereafter, the Petitioner also filed Petition No. 1804 of 2019 seeking approval for deviations from the Ministry of Power (MoP) guidelines for future tenders for sourcing Solar PV power from grid connected Solar Power Projects for fulfillment of RPO of its licence areas in respect of 'Change in Law' provisions. Commission passed Order dated 22.07.2019 in this Petition and approved deviations proposed by the Petitioner TPL in respect of 'Change in Law'. The relevant paras are reproduced hereunder:

".....

5.2. *We note that the Petitioner has sought further deviation from the Guidelines with respect to Clause 5.7 pertaining to Change in Law. It is, therefore, pertinent to refer the said Clause as well as the deviations proposed by the Petitioner along with the justification/rationale given for deviation:*

".....

Clause 5.7 Change in Law -

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

5.7.2 In these Guidelines, the term 'Change in Law' shall refer to the occurrence of the following events, after the last date of bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes which have a direct effect on the Project. However, Change in Law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends.

....."

The Petitioner has sought deviation as under:

Clause Proposed by the Petitioner:

".....

9.1 Definition

9.1.1 "Change in Law" shall refer to the occurrence of any of the following events after the Bid Deadline.

a. The enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulations, notice, circular, code, rule or direction by Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties, charges, levies etc. that results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on the generation of electricity (leviable on the final output in the form of energy) or sale of electricity.

For avoidance of doubt, it is clarified that any change in taxes or surcharge or cess or similar charges on inputs like material, labour or any other input for setting up the Project will not be allowed under Change in Law except as specified in 9.1.1 (b).

b. Introduction/Modification/Changes in the rates of safeguard duty and/or anti-dumping duty which has direct effect on the Project Cost.

9.2 Relief for Change in Law

9.2.1 In case Change in Law on account of 9.1.1 (a) above results in decrease or increase by one percent (1%) in the estimated revenue from the Electricity for the Contract Year for which such adjustment becomes applicable or more, during Operation Period, the Tariff Payment to the Power Producer shall be appropriately increased or decreased with due approval of GERC.

9.2.2 In case of Change in Law resulting on account of 9.1.1 (b) above, the Power Producer shall be allowed an increase/decrease in tariff of 1 paise/unit for every increase/decrease of Rs. 2 Lakh per MW of project capacity (AC) in the Project Cost which shall be allowed upon submission of proof of payment made by the Power Producer towards safeguard duty and/or anti-dumping duty to the concerned Authority and with due approval of GERC.

9.2.3 The Power Procurer or the Power Producer, as the case may be, shall provide the other party with a certificate stating that the adjustment in the Tariff Payment is directly as a result of the Change in Law and shall provide supporting documents to substantiate the same and such certificate shall correctly reflect the increase or decrease in costs.

9.2.4 The revised tariff shall be effective from the date of such Change in Law as approved by GERC, the Parties hereto have caused this Agreement to be

*executed by their fully authorized officers, and copies delivered to each party, as of the day and year first above stated.
.....”*

- 5.3. Clause 5.7.1 of the Guidelines provides that in case of any Change in Law which results in any adverse financial loss or gain to the solar power generator/procurer, they would be entitled to get compensation from the other party subject to the condition that the quantum and mechanism of compensation payment and effective date for such payment shall be decided by the Commission.*
- 5.4. Clause 5.7.2 defines the Change in Law. According to the said definition, five conditions as specified in the Clause qualify as Change in Law. The said clause also lists the exclusions under the Change in Law. The definition proposed by the Petitioner is quite elaborate and also includes a change in interpretation by a Competent Court of law, Tribunal, Government or Statutory Authority that results in additional tax, duty, cess etc. on generation of electricity (leviable on the final output in the form of energy) or sale of electricity.*
- 5.5. The Petitioner, in order to provide clarity as to what does not constitute Change in Law, has proposed that any change in taxes or surcharge or cess or similar charges on inputs like material, labour or any other input for setting up the project will not be allowed under Change in Law except as specified in Clause 9.1.1(b) i.e. any introduction/modification/changes in the rates of safeguard duty and/or anti-dumping duty which has direct effect on the Project Cost.*
- 5.6. Relief for Change in Law is permissible when there is Change in Law as defined in Clause 9.1.1 of the PPA. The Petitioner has proposed that in case Change in Law as specified in Clause 9.1.1 of the PPA results in the generator's costs directly attributable to the project being increased or decreased by 1% of the estimated revenue from the sale of electricity to the procurer for the contract year for which such adjustment becomes applicable, during operation period, the tariff payable to the generator is to be appropriately increased or decreased with due approval of the Commission. Further, the Petitioner has specified that in case of any Change in Law resulting on account of Clause 9.1.1(b), the Power Producer shall be allowed an increase/decrease in tariff of 1 paise/unit for every increase/decrease of Rs. 2 Lakh/ MW of project capacity in the project cost. It also stipulates that the same shall be allowed upon submission of proof of payment made by the Power Producer towards safeguard duty and/or anti-dumping duty to the concerned Authority and with due approval of the Commission. This enables both the developer as well as the procurer regarding their entitlement/liability in tariff change arising on account of Change in Law and that the Petitioner has proposed to make such adjustments with the approval of the Commission.*

5.7. *We note that Change in Law defined in the aforesaid clause may occur during construction period (after the bid submission date) or operation period of the project. In case Change in Law occurs during the construction period of the project, the tariff discovered under the Competitive Bidding Process may be affected due to change in the cost of the project on account of different parameters/criteria considered by the developer on the bid submission date undergoing change. After submission of bid documents whenever any Change in Law as defined in the bid documents occurs, it requires to verify as to whether the Change in Law proposed has occurred or not in terms of the bid documents. Further, in order to substantiate the impact of Change in Law, it requires detailed verification and scrutiny of the capital cost of the project as well as different parameters of the tariff based on which tariff is quoted by the bidder/project developer. The clarity about the Change in Law as well as relief available for Change in Law would avoid excessive litigation and complication amongst the parties.*

5.8. *The deviation proposed by the Petitioner with regard to Change in Law specified in Article 9.1 of the PPA is to bring the clarity to the Change in Law which may occur during the construction period as well as operation period of the project. It also brings clarity amongst the bidders to know before bidding as to what are the changes in taxes or surcharge or cess which do not qualify for change in law and other events which qualify as change in law and also introduction/modification/change in the rates of safeguard and/or anti-dumping duty which have a direct effect on the project cost qualify as Change in Law. It is also proposed the net effect of the Change in Law needs to be proved with respect to impact of such Change in Law on increase/decrease of estimated revenue from the sale of electricity during operation period and/or increase/decrease in tariff proposed by the bidders and/or increase or decrease of Rs. 2 Lakh per MW of the project capacity in the project cost. It is also proposed that the procurer/producer shall submit necessary evidence/documents in support of the aforesaid claim to the other party. Moreover, it requires an approval of the Commission and shall come in effect after approval of the Commission from the date of such change in law. Thus, the proposed amendment brings about the clarity amongst the bidders/procurer and would avoid future litigations amongst the parties because any Change in Law that may arise after completion of the bidding process and the parties affected approach to the opposite party with regard to the Change in Law and its impact required to be passed on to the consumers as a part of tariff. Hence, we decide to approve the same.*

.....”

6.5. From the above we note that the Petitioner has approached this Commission seeking deviation qua the provisions of guidelines regarding ‘Change in Law’. The

summary of deviations proposed by the Petitioner and approved by the Commission as stated above is as under:

(I) Provisions in draft PPA under Article 9.1 – Definition

Petition No.	Clauses approved by the Commission
1744 of 2018	<p>9.1 Definition</p> <p><i>9.1.1 “Change in Law” shall refer to the occurrence of any of the following events after the Bid Deadline.</i></p> <p><i>a. The enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulations, notice, circular, code, rule or direction by Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties, charges, levies etc. that results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on the generation of electricity (leviable on the final output in the form of energy) or sale of electricity.</i></p>
1804 of 2019	<p>9.1 Definition</p> <p><i>9.1.1 “Change in Law” shall refer to the occurrence of any of the following events after the Bid Deadline.</i></p> <p><i>a. The enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulations, notice, circular, code, rule or direction by Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties, charges, levies etc. that results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on the generation of electricity (leviable on the final output in the form of energy) or sale of electricity.</i></p> <p><i>For avoidance of doubt, it is clarified that any change in taxes or surcharge or cess or similar charges on inputs like material, labour or any other input for setting up the Project will not be allowed under Change in Law except as specified in 9.1.1 (b).</i></p> <p><i>b. Introduction/Modification/Changes in the rates of safeguard duty and/or anti-dumping duty which has direct effect on the Project Cost.</i></p>
Present Petition i.e. 1905 of 2020	<p>9.1 Definition</p> <p><i>9.1.1 “Change in Law” shall refer to the occurrence of any of the following events after the Bid Deadline:</i></p>

	<p>a. <i>the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulations, notice, circular, code, rule or direction by Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties charges, levies etc. that results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on the generation of electricity (leviable in the final output in the form of energy) or sale of electricity.</i></p> <p><i>For avoidance of doubt, it is clarified that any change in taxes or surcharge or cess or similar charges on inputs like material, labour or any other input for setting up the Project will not be allowed under Change in Law except as specified in 9.1.1(b)</i></p> <p>b. <i>Introduction/modification/changes in the rates of any taxes/duties/ cess/surcharge or similar charges on import of solar power equipment or parts thereof which has direct effect on the Project cost.</i></p>
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(II) Provisions in draft PPA under Article 9.2 – Relief for Change in Law

Petition No.	Clauses approved by the Commission
1744 of 2018	<p>9.2 Relief for Change in Law</p> <p><i>9.2.1 In case Change in Law on account of 9.1.1 (a) above results in the Power Producer’s costs directly attributable to the Project being decreased or increased by one percent (1%), of the estimated revenue from the Electricity for the Contract Year for which such adjustment becomes applicable or more, during Operation Period, the Tariff Payment to the Power Producer shall be appropriately increased or decreased with due approval of GERC.</i></p> <p><i>9.2.2 The Power Procurer or the Power Producer, as the case may be, shall provide the other Party with a certificate stating that the adjustment in the Tariff Payment is directly as a result of the Change in Law and shall provide supporting documents to substantiate the same and such certificate shall correctly reflect the increase or decrease in costs.</i></p> <p><i>9.2.3 The revised tariff shall be effective from the date of such Change in law as approved by GERC.</i></p>
1804 of 2019	<p>9.2 Relief for Change in Law</p> <p><i>9.2.1 In case Change in Law on account of 9.1.1 (a) above results in decrease or increase by one percent (1%) in the estimated revenue from the Electricity for the Contract Year for which such adjustment becomes applicable or more, during Operation Period,</i></p>

	<p><i>the Tariff Payment to the Power Producer shall be appropriately increased or decreased with due approval of GERC.</i></p> <p><i>9.2.2 In case of Change in Law resulting on account of 9.1.1 (b) above, the Power Producer shall be allowed an increase/decrease in tariff of 1 paise/unit for every increase/decrease of Rs. 2 Lakh per MW of project capacity (AC) in the Project Cost which shall be allowed upon submission of proof of payment made by the Power Producer towards safeguard duty and/or anti-dumping duty to the concerned Authority and with due approval of GERC.</i></p> <p><i>9.2.3 The Power Procurer or the Power Producer, as the case may be, shall provide the other party with a certificate stating that the adjustment in the Tariff Payment is directly as a result of the Change in Law and shall provide supporting documents to substantiate the same and such certificate shall correctly reflect the increase or decrease in costs.</i></p> <p><i>9.2.4 The revised tariff shall be effective from the date of such Change in Law as approved by GERC, the Parties hereto have caused this Agreement to be executed by their fully authorized officers, and copies delivered to each party, as of the day and year first above stated.</i></p>
<p>Present Petition i.e. 1905 of 2020</p>	<p>9.2 Relief for Change in Law</p> <p><i>9.2.1 In case Change in Law on account of 9.1.1 (a) above results in decrease or increase by one percent (1%) in the estimated revenue from the Electricity for the Contract Year for which such adjustment becomes applicable or more, during Operation Period, the tariff payment to the Power producer shall be appropriately increased or decreased with due approval of GERC.</i></p> <p><i>9.2.2 In case of Change in Law resulting on account of 9.1.1 (b) above, the Power Producer shall be allowed an increase / decrease in tariff of 1 paise / unit for every increase / decrease of Rs. 2 lakh per MW of project capacity (AC) in the Project Cost which shall be allowed upon submission of proof of payment made by the Power Producer towards any taxes / duties / cess / surcharge or similar charges on import of solar power equipment or parts thereof to the concerned Authority and with due approval of GERC. This increase / decrease in tariff due to this change in cost of PV modules shall be limited to actual DC capacity or 150% (One hundred & fifty percent) of contracted AC capacity whichever is lower.</i></p> <p><i>9.2.3 The Power Procurer or the Power Producer, as the case may be, shall provide the other Party with a certificate stating that the adjustment in the Tariff Payment is directly as a result of the</i></p>

	<p><i>Change in Law and shall provide supporting documents to substantiate the same and such certificate shall correctly reflect the increase or decrease in costs.</i></p> <p><i>9.2.4 The revised tariff shall be effective from the date of such change in Law as approved by GERC.</i></p>
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6.6. Thus, from the above tables it emerges that Petitioner is now seeking modification:

- (a). In Clause 9.1.1 (b) for replacing *“Introduction/modification/changes in the rates of any taxes/duties/ cess /surcharge or similar charges on import of solar power equipment or parts thereof which has direct effect on the Project cost”* instead of earlier approved clause *“Introduction/Modification/Changes in the rates of safeguard duty and/or anti-dumping duty which has direct effect on the Project Cost.*
- (b). In relief Clause 9.2.2 for adding sentence after GERC, *“This increase / decrease in tariff due to this change in cost of PV modules shall be limited to actual DC capacity or 150% (One hundred & fifty percent) of contracted AC capacity whichever is lower.”*

6.7. We note that the Commission has earlier already approved the deviations with regard to ‘Change in Law’ provisions. The Petitioner’s submissions are that there is possibility of change in nomenclature of safeguard duty and/or anti-dumping duty and the same may be named as ‘customs duty/import duty’ by the relevant authorities, which seems to be reasonable and therefore, word ‘custom duty’ can be included in Clause 9.1.1.(b). of the earlier approved by the Commission after safeguard duty and/or anti-dumping duty. Accordingly, instead of approving the Clause 9.1.1.(b) proposed by the Petitioner we decide to modify the earlier approved clause and approve the Clause 9.1.1.(b). as under:

“9.1.1

.....

(b) Introduction/Modification/Changes in the rates of safeguard duty and/or anti-dumping duty and/or custom duty on import of solar power equipment or parts thereof which has direct effect on the Project cost.

.....”

6.8. We note that the Petitioner has provided separate relief clauses for Change in Law in Article 9.2 whereby as per Article 9.2.1 in case of any Change in Law as per clause

9.1.1 (a) which results in decrease or increase by one percent (1%) in the estimated revenue from the Electricity for the Contract Year for which such adjustment becomes applicable or more, during Operation Period, the tariff payment to the Power producer shall be appropriately increased or decreased with due approval of GERC. Since, any change in the tax, duty, cess during the operation period of the project i.e. generation of electricity which affect directly the sale of electricity or procurement of electricity can be evaluated easily and the same can be easily be allowed by appropriately increasing or decreasing the tariff discovered under the competitive bidding. Similarly, in case of Change in Law resulting on account of clause 9.1.1 (b), the Petitioner has proposed that the Power Producer shall be allowed an increase / decrease in tariff of 1 (one) paise / unit for every increase / decrease of Rs. 2 lakh per MW (Rupees Two lacs per MW) of project capacity (AC) in the Project Cost. According to the said provision any change in project cost for the AC capacity corresponding change in tariff of 1 paise per unit for Rs. 2 lakhs per MW to be allowed upon submission of proof of payment made by the Power Producer towards any taxes / duties / cess / surcharge or similar charges on import of solar power equipment or parts thereof to the concerned Authority. The Petitioner has further proposed that such increase / decrease in tariff due to change in cost of PV modules shall be limited to actual DC capacity or 150% (One hundred & fifty percent) of contracted AC capacity, whichever is lower. Also, according to the relief clause proposed by the Petitioner each party is required to provide to other party a certificate stating that the adjustment in the tariff payment is directly on account of Change in Law alongwith all supporting documents to substantiate the same and revised tariff to be made affective with due approval of GERC from the date of such Change in Law approved by the Commission. Thus, it is apparent that only after due approval of Commission regarding the revision in tariff on account of Change in Law the revised tariff is to be made effective. We note that the Commission has allowed adding word 'custom duty' in Clause 9.1.1.(b) along with antidumping duty and/or safeguard duty as stated above as approved by the Commission earlier. Accordingly, we need to incorporate the same in the relief clause and decide to approve the relief clause in Clause 9.2.2 as under:

“.....

9.2.2 In case of Change in Law resulting on account of 9.1.1 (b) above, the Power Producer shall be allowed an increase / decrease in tariff of 1 paise / unit for every increase / decrease of Rs. 2 lakh per MW of project capacity (AC) in the Project Cost incurred up to the Scheduled Commercial Operation Date which shall be allowed upon submission of proof of payment made by the Power Producer towards change in the rates of safeguard duty and/or anti-dumping duty and/or custom duty on import of solar power equipment or parts thereof to the concerned Authority and with due approval of GERC. This increase / decrease in tariff due to this change in cost of PV modules shall be limited to actual DC capacity or 150% (One hundred & fifty percent) of contracted AC capacity whichever is lower.

....”

6.9. We, therefore, decide to partly approve the deviations proposed by the Petitioner as above from Clause 5.7 pertaining to ‘Change in Law’ from the Guidelines issued by the Ministry of Power, Government of India vide Notification No. 23/27/2017-R&R dated 03.08.2017 and allow the provisions regarding ‘Change in Law’ under Article 9 of the draft PPA as approved above.

7. Now, we deal with the third deviation proposed by the Petitioner which relates to ‘Commissioning Schedule’ provisions in Clause 14.3 of the guidelines issued by the Ministry of Power, Government of India vide Notification No. 23/27/2017-R&R dated 03.08.2017 as amended vide Resolution No. 283/57/2018-GRID SOLAR dated 22.10.2019 and has proposed separate provisions for RfS and PPA. In this regard, it is necessary to refer Clause 14.3 of the Guidelines issued by the Ministry of Power, Government of India is reproduced below:

“.....

14.3 Commissioning Schedule:

(i) *The projects shall be commissioned within a period of 15 (fifteen) months from the date of execution of the PPA, for projects specified to be set up in Solar park, and within a period of 18 (eighteen) months from the date of execution of the PPA, for projects not specified to be set up in Solar park. However, if for some reason, the scheduled commissioning period needs to be kept smaller than that provided in these Guidelines, the Procurer can do the same. Subject to clause no. 5.4 of these Guidelines, delay in commissioning, beyond the Scheduled Commissioning Period shall involve penalties, on the Solar Power Generator, as detailed below:*

(a) *For Delay in commissioning upto 6 (Six) months from SCD, encashment of Performance Guarantee (PG) on per day basis and proportionate to the capacity not commissioned.*

(b) For Delay in commissioning beyond six months from SCD, Generator Event of Default, as per clause 5.6.1 of these Guidelines shall be considered to have occurred and the contracted capacity shall stand reduced to the project capacity commissioned upto SCD + 6 (six) months. The PPA for the balance capacity not commissioned shall be terminated.

(ii) In case of site specified by the Procurer, any delay in handing over land to the Solar Power Generator in accordance with the given timelines, shall entail a corresponding extension in financial closure and scheduled commissioning date, provided that the maximum extension shall be limited to a period of 1 year commencing from the expiry of date of handing over of balance 10% of land in terms of Clause 3.2.1 (a).

(iii) It is presumed that in terms of Clause 10.4 of these Guidelines, the tariff will be adopted by the Appropriate Commission within 60 days of such submission. However, notwithstanding anything contained in these Guidelines, any delay in adoption of tariff by the Appropriate Commission, beyond 60 (sixty) days, shall entail a corresponding extension in scheduled commissioning date.”

.....”

7.1. According to the Petitioner undertaking competitive bidding process for procurement of renewable power on long-term basis to meet RPO obligation of the licensee is a long drawn and time consuming process. Moreover, after having discovered the competitive rates for supply of power through such process, it would be counter-productive to terminate any capacity which is not commissioned since it would require the Petitioner to once again repeat the entire process. Hence, in light of various uncertainties impacting the project and in the interest of the licensee and its consumers, it would not be appropriate to mandate the Petitioner to terminate the balance capacity not commissioned by SCOD. It is further submitted that discretion needs to be provided to the Petitioner to assess the ground reality and decide as to continue with the PPA or terminate the balance capacity. Accordingly, the Petitioner has proposed to incorporate suitable commercial mechanism to continue with the balance capacity at its discretion in case of delay in the COD of balance capacity beyond six months from SCOD and has sought approval of the proposed changes in this regard in both PPA and RfS by incorporating appropriate Clause in the RFS and PPA which reads as under:

RfS

3.11.3 Penalty for Delay in Commissioning: The Project shall be commissioned upto the SCOD. Consequences of non-achievement of Project Commissioning on or before SCOD except due to the Force Majeure Event as per the terms of the PPA or due unavailability of transmission system for reason solely attributable to STU-GETCO/CTU, are as follows:

i. Delay upto six (6) months from SCOD: TPL will encash Performance guarantee on per day basis and proportionate to the balance Capacity not commissioned

[e.g. for a Project of 100 MW capacity, if commissioning of 40 MW capacity is delayed by 30 days from the SCOD, then the penalty shall be: PG amount X (40/100) X (30/180).]

ii. For delay in commissioning beyond 6 (six) months from SCOD: For Delay in commissioning beyond 6 (six) months from SCOD, Generator Event of Default as per Clause 10.2.1 of the PPA, shall be considered to have occurred to have occurred TPL will have sole discretion of reducing the project capacity commissioned upto SCOD + 6 (six) months and terminate the PPA for the balance capacity. However, TPL may allow further extension for commissioning of the Project subject to mutual discussion & bidder's concurrence to comply with the appropriate commercial mechanism as may be required by the Procurer

In addition, if the Commissioning of the Project or part thereof is delayed beyond the start date of grant of transmission open access, then transmission charges should be borne by Successful Bidder till COD of the last Unit for the capacity not commissioned.

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

Any delay in adoption of tariff by the Hon'ble GERC beyond 60 (Sixty) days from date of filing of petition by TPL shall entail a corresponding extension in SCOD.

For the purpose of calculations for penalty, the month shall be considered consisting of 30 days.

PPA

3.3 Liquidated Damages for delay in Commissioning the Project beyond Scheduled Commercial Operation Date (SCOD)

The Project shall be commissioned upto Scheduled Commercial Operation Date. The Power Producer shall have to submit Commissioning Certificate as verified inspected and certified by GEDA. Consequences of non-achievement of Project Commissioning on or before SCOD Except due to the Force Majeure Event as per the terms of the PPA or due to unavailability of transmission system for reason solely attributable to STU-GETCO/CTU, are as follows:

- i. **Delay upto six (6) months from SCOD:** TPL-D will encash Performance Guarantee on per day basis and proportionate to the balance Capacity not commissioned:

[e.g. for a Project of 100 MW capacity, if commissioning of 40 MW capacity is delayed by 30 days from the SCOD, then the penalty shall be: PG amount X (40/100) X (30/180).]

- ii. **For delay in commissioning beyond 6 (six) months from SCOD:** For Delay in commissioning beyond 6 (six) months from SCOD, Generator Event of Default as per Clause 10.2.1 of the PPA, shall be considered to have occurred. TPL will have sole discretion of reducing the project capacity commissioned upto SCOD + 6 (six) months and terminate the PPA for the balance capacity. However, TPL may allow the further extension subject to mutual discussion & bidder's concurrence to comply with the appropriate commercial mechanism as may be required by the Procurer.

In addition, if the Commissioning of the Project or part thereof is delayed beyond the start date of grant of transmission open access, then transmission charges should be borne by Successful Bidder till COD of the last Unit for the capacity not commissioned.

In the event of termination of PPA or part thereof, any damages or charges payable to the STU/CTU, for the Open Access of the Project shall be borne by the Power Producer.

Any delay in adoption of tariff by the Honourable GERC beyond 60 (Sixty) days from date of filing of petition by TPL-D shall entail a corresponding extension in SCOD.

For the purpose of calculations for Liquidated Damages, the month shall be considered consisting of 30 days.

.....”

- 7.2. We note that Clause 14.3.1 (a) of the guidelines is regarding delay in commissioning up to 6 (six) months from SCOD and provides that in such event encashment of the Performance Bank Guarantee (PBG) on per day basis and proportionate to the capacity not commissioned. The Petitioner has also proposed similar clause regarding delay in commissioning up to 6 (six) months from SCOD in RfS and PPA alongwith example. Further, the Petitioner is proposing that for delay in commissioning beyond 6 (six) months, the Petitioner may in its sole discretion reduce the project capacity commissioned up to the SCOD plus 6 months and

terminate the PPA for balance capacity or may allow further extension for commissioning the balance capacity of the project subject to mutual discussion amongst the parties and bidder's concurrence to comply with the appropriate commercial mechanism as may be required by the Petitioner. We are of the view that granting any sole discretion to the procurer to decide regarding whether to avail the balance capacity which is not commissioned within six months after SCOD may not be reasonable. Moreover, the Petitioner as distribution licensee needs to undertake competitive bidding process for procurement of renewable power on long term basis to meet its RPO obligation and therefore, any capacity tied up is not fully commissioned within the period of SCOD plus six months may lead to shortfall in meeting the RPO targets stipulated by the Commission. Also, the guidelines itself clearly provide that for delay in commissioning any capacity beyond 6 (six) months from SCOD, then the contracted capacity shall stand reduced to the project capacity commissioned upto SCOD + 6 (six) months and the PPA for the balance capacity not commissioned shall be terminated. We are accordingly, of considered opinion that extension cannot be granted with regard to balance capacity not commissioned even after 6 months of SCOD. Hence, we decide not to approve the deviation sought by the Petitioner in this regard.

- 7.3. In view of above, we decide not to grant the approval for the deviations sought by the Petitioner from Clause 14.3 pertaining to 'Commissioning Schedule' from the Guidelines issued by the Ministry of Power, Government of India vide Notification No. 23/27/2017-R&R dated 03.08.2017 as amended vide Resolution No. 283/57/2018-GRID SOLAR dated 22.10.2019. Accordingly, we decide that relevant clause in RfS and PPA regarding '*For delay in commissioning beyond 6 months from SCOD*' which is approved by the Commission in line with relevant provision in guidelines shall be as under:

Clause approved by the Commission:

"For delay in commissioning beyond 6 (six) months from SCOD: For Delay in commissioning beyond 6 (six) months from SCOD, Generator Event of Default as per Clause 10.2.1 of the PPA, shall be considered to have occurred and the contracted capacity shall stand reduced to the project capacity commissioned upto SCOD + 6 (six) months. The PPA for the balance capacity not commissioned shall be terminated."

8. In view of above, the present Petition succeeds partly in terms of our decision with regard to the deviations sought by the Petitioner for (i) 'Force Majeure' provisions in draft PPA; (ii) 'Change in Law' provisions in PPA; and (iii) 'Commissioning Schedule' provisions in RfS and draft PPA in relevant paras above.
9. With this order the present Petition stands disposed.
10. We order accordingly.

Sd/-
[S. R. PANDEY]
Member

Sd/-
[MEHUL M. GANDHI]
Member

Sd/-
[ANAND KUMAR]
Chairman

Place: Gandhinagar.

Date: 26.02.2021.