

Petitioner had not challenged the same. It is further submitted the issues of vendor etc. have to be kept in mind prior to entering into an agreement or even otherwise should have been raised when extension was sought.

8.33. It is contended that in the Order dated 07.12.2018, the Commission had not accepted the request for extension of SCOD by 18 months from date of disposal of Petition but had granted extension for about a year upto 31.12.2019 as last opportunity and the same was not challenged by the Petitioner. On the contrary, the Petitioner entered into a Supplemental PPA agreeing to the SCOD of 31.12.2019 and that no further extensions would be sought. No issue was raised in regard to only 10 months being left and in any case the extension was granted regarding a specific date of 31.12.2019 and not from date of agreement. In fact, the Petitioner itself had sought for extension only from date of disposal of Petition and not from date of Supplemental Agreement. It is submitted that there has been no progress in the project during above period. This is particularly considering the claim now made by the Petitioner that the land of 175 acres is sufficient for Phase 1. However, the land of 175 acres was available as far as back as in the year of 2016 and hence there is no reason why the first phase was not finished at least by 31.12.2019.

8.34. It is contended that the Petitioner having accepted the period of extension granted by the Commission and not having challenged the same, the Petitioner cannot now seek additional time on the basis that its lenders/contractor sought more time for funding of the project. Further, the gestation period for solar thermal project as per Orders of the Commission itself is 18 months as agreed to by the Petitioner and in fact the Petitioner itself had requested for 18 months in its affidavit dated 23.08.2018 which was objected to by the Respondent GUVNL. However, extension of 18 months sought by the Petitioner in Petition No. 1608 of 2016 was not accepted by the Commission. In this regard the PPA was signed in the year 2010 between the parties and the Petitioner in the meantime has claimed that it had achieved a lot of progress such as incurring expenditure of Rs. 211 Crores, procuring land and obtaining permissions, procuring plant/equipment, receipt of material at site etc., undertaking construction work and yet the timeline being claimed as if no progress has been done during this entire period and the project has to commence afresh. There is no logic or rationale to the same.

8.35. It is also contended that after the Commission's Order dated 07.12.2018, the Petitioner had approached the State Bank of India only on 29.04.2019. Further even now the Petitioner is still approaching banks/financial institutions which itself is a clear delay by the Petitioner. It is stated that the issues with financing are not relevant and the claim based thereon has already been rejected by the Commission in Order dated 07.12.2018 itself and this has also been held by the Hon'ble Tribunal in case of *Taxus Infrastructure & Power Project Limited V/s. Gujarat Urja Vikas Nigam Limited & Ors.* in Appeal No. 131 of 2015 dated 04.07.2018. Similarly, issues related to contractor also fall under Force Majeure exclusions. It is the responsibility of the Petitioner to complete the project and the Petitioner had agreed to a certain timeline. There can be no further extension on any claim of contractor or sub-contractor or EPC contractor. Moreover, the said claim is not substantiated and the same is denied. It is also not clear why the Petitioner is still sourcing material and needs EPC Contractor when it has already incurred Rs. 211 Crores and now in the present Petition has claimed Rs. 221.23 Crores and claimed to have procured equipment/plant etc. On the one hand, the Petitioner has claimed that it had ordered all the long lead equipment from Europe and are ready and yet the Petitioner is still talking to EPC contractor in China. It is denied that the Petitioner is entitled to any extension. It is denied that the Petitioner has made robust approach and endeavour to complete the project. It is denied that the Petitioner has invested Rs. 221.23 Crores or more.

8.36. It is contended that the nature of the project is not relevant to the present issue. The Petitioner had willingly agreed to a timeline both in terms of the Supplemental PPA and by accepting Order dated 07.12.2018 which has achieved finality. The Petitioner did not challenge the said Order by claiming that the time that was granted by the Commission was not sufficient for such a Solar Thermal project. It is therefore not open to the Petitioner to now claim further extension. Further the project of the Petitioner is inordinately delayed. The Petitioner has already been granted extension of eight years and further the Petitioner is seeking 2 more years and perhaps even more thereafter. The Petitioner cannot keep asking for more and more time contrary to the PPAs/contracts and the Orders of the Commission. It is submitted that there is no clarity on the ability of the Petitioner to finish the project

within any stipulated time. The Petitioner even now is asking for much more time than what had been agreed in the Original PPA dated 30.04.2010 despite all the alleged work it has already done. Even in the present Petition, the Petitioner has not provided any details of the land which it now claims are required only of 175 acres and further claims to have the said land.

8.37. It is denied that the Petitioner has made substantial investment or achieved any progress. The claims of the Petitioner are contradictory as it claim to have invested Rs. 221 Crores having ordered all major equipment and the equipment being ready for shipping or already shipped as well as land being procured and yet the Petitioner is seeking 24 months which is more than what was agreed to in the PPA for completing all activities. It is denied that the Petitioner has undertaken development work possible on the land for which 89A permission is claimed to be received. The statement of the Petitioner is contrary to the letter dated 06.06.2020, wherein the Petitioner claims that 175 acres is sufficient for starting construction. This land was available as far back as 2016 (if not 2012) and yet the Petitioner has not completed the first stage within the time granted of 31.12.2019.

8.38. It is further contended that the Petitioner has accepted the Order dated 07.12.2018 and the same has been not challenged by the Petitioner and also had entered into a Supplemental Agreement by agreeing to such date of 31.12.2019 and that no further extension be sought. It is denied that date of signing of the Supplemental PPA has any relevance to the issue involved in the present Petition and it was the Petitioner who delayed the signing of the Contract. The Petitioner delayed in approaching the lender even after Order dated 07.12.2018 and the issues with lenders/financial closure cannot be a reason for extension as the same have already been rejected by the Commission in above Order. The Petitioner is barred by Principle of Res Judicata from raising the same issue again. Similarly, the reluctance of EPC Contractor cannot be basis for extension. There is no clarity on why EPC contractor is needed when the equipment is already procured and the timeline of 24 months needed when the Petitioner has claimed that it has already completed various activities which are otherwise included in the gestation period.

8.39. It is denied that the Petitioner had only 7 months to complete the project while it

had been granted more than one year in Order dated 07.12.2018 which was accepted by the Petitioner. The promotion of renewable energy cannot be a basis to supersede the contract or ignore previous Orders of the Commission. Such Orders and PPAs have been entered into keeping in mind the renewable project. The Principle of Res Judicata cannot be ignored on the ground that it is a renewable project. The alleged investment made by the Petitioner is also not a reason to ignore the provisions of contract and issues already decided by the Commission. It is submitted that the alleged nature of the project is unimportant when the Project does not appear to be materialized. The Petitioner has been only seeking extensions for past 10 years and this situation cannot be allowed to continue. For the alleged delay of statutory approvals and allocation of land, the extension has already been granted until 31.12.2019 and the Petitioner has clearly stated that it is not asking for extension on those grounds as raised in the present Petition and therefore the reference to the same are unwarranted. It was the Petitioner's responsibility to ensure the completion of the project by 31.12.2019 but the Petitioner has failed to do so. If there is any waste of investment, the same is on account of the Petitioner.

8.40. It is contended that the Respondent GUVNL being a Government entity does not mean that GUVNL should keep granting extensions and not enforce contractual rights or that the Petitioner be allowed to function as per its own will. There is an intent and purpose to the PPA being executed and certain terms being agreed between the parties. Once the parties have entered into a contract, no party can seek to avoid the terms of the contract. Further, it is contended that the Respondent GUVNL represents the distribution companies which in turn represents their consumers and therefore, now it cannot be that the Petitioner is allowed benefits at the cost of consumers at large. Therefore, the Petitioner is liable to pay compensation to Respondent GUVNL for failure on the part of the Petitioner to achieve COD by SCOD in terms of the PPA.

8.41. Based on the above, it is submitted that the Petitioner is not entitled to any relief, as claimed in these matters since claim of the Petitioner for entitlement of extension of time is without any merits and the Petition is liable to be dismissed with costs.

REPLY OF RESPONDENT GUVNL IN IA NO. 03 OF 2021:

9. The Respondent GUVNL has also filed its reply vide affidavit dated 16.03.2021 in IA No. 03 of 2021 and apart from reiterating the contents of reply filed in main Petition, it is submitted that the filing of aforesaid IA by the Applicant/Petitioner is substantially delayed, it lacks bona-fide and seeks to change the scope of the Petition, which cannot be permitted. It is also contended by the Respondent GUVNL that said IA seeking amendment is an afterthought and deserves to be dismissed.
- 9.1. It is further contended that the Petitioner has filed main Petition seeking further extension of time for completing the construction and for achieving commercial operation of its Power Project upto 31.12.2021 despite having initially agreed to establish the Solar project by 31.12.2011 in terms of the PPA dated 30.04.2010. Moreover, the Petitioner has been granted several extensions and lastly the Commission vide Order dated 07.12.2018 in the Petition No. 1608 of 2016 had granted the extension up to 31.12.2019 after rejecting the specific relief of extension of 18 months sought therein. Moreover, after considering the inordinate delay in achieving COD and the failure of the Petitioner in regard to land issues it is held that extension for more than one year would not be appropriate. It was also recorded by the Commission that it is only as a last opportunity that the SCOD to be extended upto 31.12.2019. Thus, the SCOD of the Petitioner's project has been extended by 8 years and it has been more than 10 years since the PPA was executed and the project as still not achieved any substantial progress.
- 9.2. It is contended that the Commission's Order dated 07.12.2018 has not been challenged by the Petitioner but the same has been accepted by the Petitioner including the timelines of extension upto 31.12.2019. Moreover, the Petitioner has willingly and without any objection or protest has executed the Supplementary PPA with the Respondent GUVNL on 26.02.2019 with SCOD up to 31.12.2019.
- 9.3. It is also contended that even in the previous Petition, the Petitioner had sought only 18 months from date of disposal of Petition but is now seeking extension of 24 months from date of disposal of the present Petition and further extension of 6 months on account of COVID pandemic. The COVID period is already over and it is not clear if the Petitioner is seeking 30 months or 24 months. Thus, the amendment in prayer clauses is to be rejected on grounds of uncertainty also.

- 9.4. It is contended that the Petitioner cannot approbate and reprobate. The Petitioner having accepted the Order dated 07.12.2018 and has entered into Supplementary PPA cannot now claim that it needs further time. It is submitted that the Supplementary PPA is the final and binding document between the parties. Further the Petitioner itself has chosen to file a Petition and sought extension upto 31.12.2021. There was no reference at that time for the extension period from the date of disposal of the Petition or Order of the Commission. Such amendment is therefore not consistent with the original Petition filed. The parties having filed their replies and pleadings being completed; the Petitioner cannot now seek to amend the Petition. It is therefore clear that the Petitioner has neither taken any step since the Order dated 07.12.2018 itself nor during the period after filing of the Petition.
- 9.5. It is contended that the Petitioner has not provided any new reasons for seeking such amendments in the Petition. The filing of additional submissions was in the month of June-July 2020 and cannot be the basis for seeking amendment in January 2021. Further, a query was raised by the Commission does not in any manner give right or liberty to the Petitioner to seek amendment in the Petition. There is no rationale or link to the filing of the present Application for amendment. In these circumstances, the Application filed for amendment is misconceived and such application of amendment has to be considered in the light of the Principles of Order 6 Rule 16 of Code of Civil Procedure, 1908. One of the fundamental conditions for considering an application for amendment is that the plaintiff or the person seeking amendments has acted in bonafide manner and comes to court with clean hands. The earlier Order dated 07.12.2018 and the Supplementary PPA cannot be set at naught by seeking an amendment in the Petition filed.
- 9.6. It is contended that the Petitioner has not taken any steps for completion of the project and is seeking extension after extension. At the time of Petition No. 1608 of 2016, the Petitioner had sought extension for 18 months which itself had been rejected and only one year was allowed. In the present Petition, the Petitioner sought further extension of 24 months from the said date, which itself is incorrect and now the Petitioner is seeking 24 months plus 6 months from date of disposal of the present Petition. It is further stated that the original scheduled date as per the

PPA dated 30.04.2010 was 18 months after the PPA. It is, therefore, clear that the Petitioner is not interested in actually completing the project and is seeking extension for some ulterior motive. The Petition and Application filed by the Petitioner are abuse of process of court.

- 9.7. It is contended that the Petitioner has not come with clean hands. On one hand, the Petitioner claims to have done work and spent money. However, on the other hand, the time sought by the Petitioner is more than the original timelines which means no work is done. The PPA dated 30.04.2010 provided for schedule date of 31.12.2011 which was 18 months after the PPA. Thereafter, the Commission in Order dated 07.12.2018 had rejected the extension of time of 18 months and granted only one year extension. Therefore, in seeking 24 months plus 6 months, the Petitioner is not only seeking more time than the time period recognized in PPA itself, but also admitting that it has done no work at all in these 10 years. Similarly, no work / progress has been done from 07.12.2018 when the Order was passed by the Commission. As of now, the Petitioner has admitted that it would not undertake any work until the Order is passed by the Commission.
- 9.8. It is contended that there is absolutely no rationale for the Petitioner's project to be implemented under the PPA which was executed in the year 2010 which Scheduled Commissioning Date is 31.12.2011, at this belated stage. The Petitioner is only seeking extension after extension without making any commitment about its work process. Evidently, the assurances of the Petitioner are meaningless as the Petitioner is not able to complete its work.
- 9.9. It is also contended that the query raised by the Commission cannot be a reason to claim any amendment. It is denied that there is any imperative to amend the prayer. It is further submitted that the Order was passed in the month of June 2020 by the Commission to which submission has been filed in the month of July 2020. The Respondent has also filed its reply on 23.07.2020. The IA No. 03 of 2021 is filed in the month of January 2021, which clearly show an afterthought of the Petitioner.
- 9.10. It is stated that there is no merit in the prayers made by the Petitioner as the Application filed and relief sought therein is only an abuse of Court and the Petitioner cannot claim relief against the liability to pay liquidated damages. Further

there is no Force Majeure event. Moreover, the COVID 19 was after the extended scheduled date which was already over. It is also submitted that there can be no direction for signing of the Supplement PPA and there is no merit for granting any further extension beyond the extension granted as per the Order dated 07.12.2018.

- 9.11. It is denied that there would be no prejudice caused to the Respondent as the Petitioner has repeatedly made commitment and not complied with the same. Further, the Petitioner with full knowledge had filed the present Petition with a prayer of extension upto 31.12.2021. Now, the Petitioner is seeking further extension without any date but a vague claim of 24 months plus 6 months. The Respondent cannot be expected to wait forever for the Petitioner's project. It has already been more than 10 years from the date of the signing of the PPA with the Petitioner. In the meanwhile, the price for procurement of electricity to fulfil Solar Power RPO has come down drastically. Therefore, there is no justification in public interest or consumers' interest to continue with the PPA of Petitioner specifically when the present tariff for solar power is significantly lower in the range of Rs. 1.99/ Unit as per the recent Competitive Bidding Process undertaken by the Respondent.
- 9.12. It is denied that the application is bonafide and if not allowed, it would cause grave prejudice to the Applicant / Petitioner. The Petitioner is abusing the process of court by repeatedly seeking extension of SCOD which it is not able to comply with and also not provided any reason or rationale for such amendment. The amendment is only an afterthought as the Petitioner cannot meet the deadline of 31.12.2021 either. Therefore, the Petitioner is not entitled to any relief, as claimed in the Application/Petition. Therefore, the Application filed by the Petitioner is liable to be dismissed.
10. Pursuant to the liberty granted by the Commission to both the parties to file their respective written submissions in the present matter the same have been filed by both the Petitioner and the Respondent GUVNL. The gist of the same are enumerated as under:

Written Submissions (Applicant/Petitioner):

- 10.1. That the present Petition is filed seeking adjudication of dispute arising out of PPA

dated 30.04.2010 in respect of extension of time limit for SCOD by 24 months and additional 6 months on account of COVID-19 pandemic.

10.2. With regard to the query in respect to completion of project, it is stated that the prevailing COVID-19 conditions are an impediment to procurement of equipment, materials, construction and deployment of foreign personnel, which has affected the project and during the continuance of COVID-19. There has been restriction on movement, material and equipment and the uncertainty still looms large. The Petitioner is bound by the directions and Orders of the Central and State Governments in this regard and considering 'Unlock 2.0' guidelines of the Ministry of Home Affairs, Government of India, the regular commercial operations had been impeded. However, to utilize the prevailing conditions and impact of COVID pandemic, the Petitioner shall be completing all documentation and financing of the project and commence operations, subject the extension as prayed for in the present Petition. It is submitted that the Petitioner is committed to the completion of its project which is first of its kind project employing molten salt based thermal storage system. The completion of the project will not only provide storage of 9 hours of electricity but will also serve as a technology demonstration vehicle potentially leading to more investments in such projects. This solar technology with thermal storage offers reliable, stable and cheaper source of power compared to existing conventional power plants and such project shall also be interest of the Respondent. This greenfield project shall create multiple local and social economic benefits by generating local employment, increasing standard of living of the rural population nearby the project location. It is submitted that the conditions after February 2020 certainly constitutes as 'Force Majeure' conditions as per the provisions of PPA executed between the parties and this COVID-19 pandemic being an unprecedented and massive impediment to movement and thereby caused the period of delay of more than 24 months.

10.3. In respect of the Commission's query about financing of the project and the willingness of lenders to finance the project, it is submitted that pursuant to the directives of the Commission in its Order dated 07.12.2018, the Petitioner had regularly submitted monthly progress reports to the Commission as well as Respondent. It is submitted that State Bank of India vide letter dated 07.05.2019

states that 24 months is required for extension of PPA/SCOD as a prerequisite to providing financial assistance for the project which was brought to the attention of Respondent and Commission. Moreover, the Petitioner has also received letters dated 15.01.2020 and 04.07.2022 from PFC stating that 24 months as a prerequisite to providing financial "assistance for the project. Since the project could not be started without financial closure and the limited extension period was a roadblock to financial closure, the Petitioner has filed the present Petition seeking extension of PPA /SCOD as prayed, on the grounds of inaction / delay by State Government and problems in achieving financial closure in the extended time period. Thereafter, the Petitioner has also approached another financial institution i.e., Power Finance Corporation (PFC), during the ongoing COVID-19 pandemic and PFC has shown willingness to fund the project subject to a clear PPA extension for 24 months. Documentation and other requirements for achieving financial closure are in place and the only impediment to financial closure is that the SCOD period is not sufficient as per the assessment of financial Institutions. The reluctance to fund the project is not because of a default on part of the Petitioner but solely based on the understanding that Solar Power Projects with thermal storage systems require a longer period for execution.

10.4. Moreover, the bids invited by the Respondent for Solar PV projects have been allowed with implementation timeline of 18 months whereas the Solar Thermal projects are more advanced in technology and has more components involved in construction. Therefore, this technology requires minimum 24 months to set up the project. By granting 24 months of PPA/SCOD extension to the Petitioner, the Respondent shall not be affected in any manner as there is no commercial loss for the Respondent rather the Respondent can avail the benefit in terms of reliable, stable and round the clock green source of power even during peak hours. The Respondent is currently procuring power at Rs. 15 to Rs. 17 per kWh during peak hours and high demand situations whereas the Petitioner can supply power at much cheaper cost as per the PPA terms when the project is commissioned. The Petitioner assures that financial institutions are willing to finance the project on the condition that at least 24 months of extension is granted for achieving SCOD.

10.5. Further, the interpretation of the condition not to approach the Commission in

future as contained in the Supplemental PPA as complete bar on the Petitioner to approach this Commission would in effect deprive the Petitioner of its statutory rights to approach this Commission and would also be an impediment on the statutory powers of this Commission to adjudicate on the disputes arising between a generator and licensee. It is submitted that such interpretation would be akin to creating a bar on statute on the basis of a contract and the same would render the Petitioner remedy-less even in the face of serious force majeure conditions i.e. COVID-19 pandemic. Such construction would be wholly unreasonable and unfair. The present circumstances, grounds and cause of action based on which the present Petition has been filed are completely different from the earlier Petitions and the Petitioner is seeking support of the Commission considering the unprecedented conditions that have arisen.

10.6. It is stated that the Supreme Court in its Order dated 23.03.2020 held that due to the outbreak of the COVID-19 pandemic, the period of limitation in all types of proceedings before Courts or Tribunals be extended with effect from 15.03.2020 till the date any further orders are passed in the same respect. Thereafter, the Supreme Court, on 08.03.2021, terminated the period of limitation from 15.03.2020 to 14.03.2021. Further, the Supreme Court vide Order dated 23.03.2020 directed the extension of period of limitation in all proceedings before Courts/Tribunals including this Commission with effect from 15.03.2020 till further Orders. The order dated 23.03.2020 was restored and thereby, the period between 15.03.2020 and 28.02.2022 will not be considered for limitation purposes with respect to all judicial or quasi-judicial proceedings.

10.7. It is submitted that the conditions preventing the Petitioner from achieving financial closure and therefore, achieving SCOD are completely not within the Petitioner's control. Clause 8.1 of the PPA provides an inclusive definition of force majeure events which are beyond the reasonable control of the Petitioner. Sub-Clause provides for requirements, action or omissions to act pursuant to any judgement or order of any court or judicial authority in India. It is stated that the revised SCOD of 12 months as directed by the Commission in its Order dated 07.12.2018, prevented the Petitioner from achieving financial closure as no financial institution was willing to provide credit facility after considering timelines prescribed by the Commission.

In support of this, reliance is being placed on the case of MPPMCL V/s. Renew Clean Energy Private Limited and Anr (2018) 6 SCC 157, wherein the Hon'ble Supreme Court has held that delay in commissioning the project due to unavoidable circumstances, though the same may not be force majeure, having invested huge amounts, the termination of the contract/PPA is not fair. Moreover, the act of Respondent delaying the signing of supplemental PPA is also covered in sub-clause (v) of Clause 8.1 of the PPA prescribing inability despite complying with all legal requirements to obtain, renew or maintain required licenses or legal approvals.

- 10.8. With regard to the query as to why the Petitioner signed the supplemental PPA with conditions, it is submitted that the Petitioner by filing Petition No.1608/2016 had sought extension of SCOD by 18 months based on the time frame considered in CSE Expert Group's (MNRE) recommendation letter dated 05.05.2016. Further, this Commission vide Order No. 02 of 2010 dated 29.01.2010 has observed that gestation period recognised for Solar Thermal Project was about 18 months. However, the Commission has only extended the date of SCOD to 31.12.2019 vide its Order dated 07.12.2018 in Petition No. 1608 of 2016 i.e., 12 months from issuance of the date of Order.
- 10.9. That despite the Petitioner's best efforts, the supplemental PPA was only signed by the Respondent on 26.02.2019. It is submitted that as recorded in Para 3.2 of Order dated 12.06.2020 the Respondent has submitted that the time period for signing of supplemental PPA has no significance since there was no specific direction of the commission in the order dated 07.12.2018 to sign the supplemental PPA within a particular time. It is submitted that such submissions clearly highlight the non-cooperation of the Respondent in signing the supplemental PPA without which no financial institution would even examine the Petitioner's application for financing the project. It is stated that the Supplementary PPA was only signed on 26.02.2019 i.e., around 4 months after the date of Commission's Order dated 07.12.2018 in Petition No.1608/2016 and the Petitioner was only left with only 9 months to achieve SCOD which was completely insufficient.
- 10.10. It is stated that thereafter the Petitioner has approached State Bank of India seeking sanction of credit facility for the project. In response SBI and PFC informed the

Petitioner that on advice of its Independent Engineer minimum timeline for completion of Project was approximately 18 months and approximately 6 months further time would be required to revalidate or seek fresh sanctions of credit facilities from various banks, totaling to 24 months. Hence, the period of 7 months left at the time of issuance of letter was not sufficient for completion of project.

10.11. It is stated that the present Petition is arising out of different cause of action, facts and grounds and conditions in the supplemental PPA and the same cannot be said to barring the Petitioner's remedy to approach this Commission under the Act. Also, the Petitioner submitted progress, work orders are as under:

- (a). Work Order for EPCM contractor with M/s IDOM, Spain
- (b). Work Order for Solar Field supply with M/s Schlaich Bergermann Partner (SBP), Germany
- (c). Purchase Order for Steam Turbine Generator (STG) from M/s GE, Italy
- (d). Purchase Order for Steam Generator from M/s Aalborg CSP, Denmark
- (e). Purchase Order for Condenser from M/s CHEM Process, India
- (f). Purchase Order for HTF from M/s Lanxess, India
- (g). Purchase Order for Expansion Vessels from M/s Ravi Industries, India
- (h). Purchase Order for HTF Pumps from M/s Sulzer Pumps, India
- (i). Purchase Order for Solar Field Assembly building form M/s Interarch Buildings, India

10.12. Further, the Petitioner has also finalized Vendors / Discussions at final stage:

- (a). Supply of Molten Salt,
- (b). Supply of Thermal Energy Storage system,
- (c). Supply of steel for Solar Mirror structure,
- (d). Supply of Heat collection element,
- (e). Solar field piling works,
- (f). Raw water supply pipeline
- (g). Supply of Hydraulic drives,
- (h). Supply & Erection of Transmission line, approx.
- (i). Electrical, instrumentation and Mechanical BOP,
- (j). LOI for EPC Contract executed with Lauren Engg in March 2022.

10.13. It is stated that the Petitioner has already invested equity share capital of approx. Rs. 241 Crore without any financial assistance in the project & the balance project cost is to be met by financial assistance from lenders for execution of further project activities. Thus, it is prayed that the extension may granted by the Commission, in the interest of justice and equity. It is stated that the Petitioner's project is one of its kinds in India and the Petitioner has also set up state of the art solar parabolic mirror manufacturing facility, in the name of M/s Thermosol Glass under 'Make in India' initiative which shall cater to inhouse solar parabolic mirrors for the project as well as promote parabolic through CSP technology in India. The Petitioner has invested its equity share capital of approx. Rs 122 Crores towards the development and operations of the project.

Written Submissions (Respondent):

11. The Respondent in the written submissions has stated that when the matter was last taken up for hearing on 23.06.2022, the counsel of the Petitioner has made submissions to the effect that it was almost on the verge of completion of the project and if some support is given by this Commission, the Petitioner would commission the project which is far from the actual situation. Over the last 12 years, the Petitioner has been making such submissions without even achieving financial closure or actual progress on the ground.as under:
 - 11.1. Upon perusal of the additional written submissions of the Petitioner pursuant to the Daily Order dated 28.06.2022, itself clarifies that the Petitioner is far from completing the project and is coming up with new excuses to seek time extension and that too for 24 months which means that there is no progress in the project at all.
 - 11.2. That the Petitioner has sought to amend the Petition by way of IA No. 3 of 2021 on 25.01.2021 which has also been opposed by GUVNL by its reply filed on 16.03.2021. The Petitioner had originally, sought for extension of SCOD until 31.12.2021 but thereafter now, the Petitioner is seeking further extension of 24 months from date of disposal of the Petition or Order of the Commission which is not consistent with the Original Petition filed and cannot be accepted. The application for amendment must fail on the principles of Order 6 Rule 16 of the CPC, 1908. Even otherwise, there

is no merit in the present Petition or in the claim for 24 months as required by lenders and further 6 months' time extension claimed towards COVID-19 as submitted by the Petitioner in the Written Submissions dated 08.07.2022.

11.3. That the Petitioner initially had agreed to establish its 25 MW Solar (Thermal) Power Project by 30.12.2011 under the PPA dated 30.04.2010. The Petitioner has already asked and has been granted the extension in SCOD several times as under:

- (i) Initially, for 19 months up to 31.07.2013 vide Order dated 07.04.2012 in the Petition No. 1125 of 2011.
- (ii) Further, the extension in SCOD upto 31.12.2015 vide Order dated 05.05.2015 by Petition No. 1333 of 2013.
- (iii) Another Petition being Petition No. 1513 of 2015 filed by Petitioner for the extension upto 30.06.2017.
- (iv) Thereafter, for the extension upto 31.12.2019 vide Order dated 07.12.2018 in Petition No. 1608 of 2016.

11.4. That it has been more than 12 years since the PPA between the parties was executed and more than 11 years since original SCOD. There is no cause for granting any further indulgence to the Petitioner and it is apparent that the Petitioner is not in a position to commission the project. The most crucial aspect is that this Commission vide its Order dated 07.12.2018 while considering all the factors and issues contended by the Petitioner, had extended the SCOD till 31.12.2019. The Commission specifically held that this is the last opportunity granted to Petitioner and extended the SCOD till 31.12.2019.

11.5. That having accepted the aforesaid Order, it does not lie in the hand of the Petitioner to seek another extension. The extended SCOD was 31.12.2019, till which date, there was no impact of COVID-19 or lockdown or slowdown of performance etc. Therefore, the basis of seeking time extension is misconceived. Further, to overcome the fact that the Petitioner has accepted the Order dated 07.12.2018 passed by this Commission and now the Petitioner has vaguely argued that there was a delay on the part of the Respondent GUVNL in executing the Supplementary PPA.

11.6. That there has been no observation by this Commission that the prevailing COVID-

19 conditions have acted as an impediment to the setting up of the Project by the Petitioner. On the contrary, the delay on the ground of COVID-19 cannot be the reason for extension as the SCOD of the project was 31.12.2019 and at that time, there was no restriction because of COVID-19. The Petitioner has failed to commission the project within the extended date i.e., 31.12.2019 and hence, there is no question of COVID-19 pandemic being treated as Force Majeure condition for not completing the project in extended time. The Petitioner cannot seek any relief on the basis of COVID 19. Reliance is placed on the judgement dated 29.05.2020 of the Hon'ble High Court of Delhi in the case of *Halliburton Offshore Services Inc. V/s. Vedanta Limited & Ors [OMP (I) (COMM) No. 88 of 2020]* wherein it was held that whether or not COVID-19 would justify non-performance of the contract needs to be considered in the facts and circumstances of each case. While in the present case, the Project of Petitioner had already been delayed beyond the SCOD of 31.12.2019 which was prior to COVID 19 pandemic and even otherwise, the Petitioner has not made any progress in the project to be affected by COVID 19 pandemic.

11.7. It is to note that the Petitioner is submitting that it shall complete all the documentation and financing of the project subject to extension being provided. The Commission cannot be held hostage to such demands. Merely stating that the Petitioner is committed to complete the project and this will be a first of its kind project, ignoring the past conduct of the Petitioner, is not sufficient. Further, the completion of the project at this cost can hardly be termed as 'beneficial' to the Respondent GUVNL or the general body of consumers. There is absolutely no rationale for the Petitioner's project to be implemented under the old PPA at this belated stage. The Petitioner is only seeking extension after extension without making any commitment and progress about its work process.

11.8. It is also to note that in the Written Submissions filed on 08.07.2022, the Petitioner is also seeking cost escalation. As such, the tariff agreed under the PPA with the Petitioner is Rs. 11 per unit for first 12 years and Rs. 4 per unit for next 13 years thereafter and as on date, tariff for solar power (Solar PV) is less than Rs. 3 per unit and the Respondent GUVNL at present is meeting Renewable Purchase Obligation effectively with the purchase of such RE power at considerably less price, in the interest of general body of consumers. Therefore, there is no justification in public

interest or in the interest of general body of consumers to continue with the PPA with the Petitioner.

- 11.9. That the alternative submissions of the Petitioner that the conditions since February 2020 constitute a Force Majeure under the provisions of the PPA dated 30.04.2010 are also not correct. Firstly, no such claim of Force Majeure has been raised by the Petitioner in the Petition. The Petitioner cannot go beyond the pleadings by way of written submissions at this stage. The Petitioner cannot add grounds and claims which are not stated in the Petition. In fact, there cannot be any claim of force majeure when the Petitioner itself had signed the Supplementary PPA agreeing to SCOD of 31.12.2019.
- 11.10. The submissions made by the Petitioner that there is reluctance by bank/financial institutions and problems of financial closure and EPC Contractor that they believe some more time is required. This is specifically why no further time extension is to be granted when the financial institutions are itself are not believing in the project, there is no purpose of giving time extension to the Project.
- 11.11. That the Commission has passed an Order on 07.12.2018 considering all the factors in question and the said order has attained finality as it was not challenged by the Petitioner and consequently, Supplementary PPA was executed between the parties. Now, at this stage, the Petitioner cannot claim more time. Further, since the above issue has already been dealt by the Commission in Order dated 07.10.2018, the Principle of Res Judicata will apply.
- 11.12. That the Respondent GUVNL has no obligation to deal with the financial institutions and contractors as the same is the responsibility of the Petitioner. Therefore, this cannot be considered as a valid reason for the further extension of time. The Petitioner has specifically alleged regarding grounds of inaction/delay by State Government which is incorrect. There is no such allegation of delay by State Government in the Petition and in fact the Petitioner had clarified that it is not claiming any reason which was claimed in previous Petitions.
- 11.13. That the submissions regarding reluctance on the part of the financial institutions is not because of any default on the part of the Petitioner is preposterous and ought to

be rejected at the threshold. The Petitioner has repeatedly defaulted in commissioning the project and therefore, the Petitioner has lost the trust of the lenders. The NREL, United States' data is irrelevant at this stage, since the Petitioner have accepted the Commission's Order dated 07.12.2018.

11.14. With regard to the submissions that the bids invited for Solar PV projects with an implementation schedule of 18 months, it is submitted that the same cannot be made without adverting to the much lower tariffs for such project which are in the range of Rs. 1.99 to Rs 2.75 per unit. Further, such schedule of 18 months is from the date of signing PPA. It has been more than 12 years since the Petitioner had executed the PPA with GUVNL and it is still seeking further extension of 24 months. Moreover, in respect to granting the extension to the Petitioner, there will be no loss to GUVNL is completely incorrect and denied. The Respondent GUVNL has been able to procure much cheaper solar power and such costly PPA with the Petitioner will have financial implication on the Respondent GUVNL as it is not commissioned as per the approved SCOD.

11.15. Moreover, the attempt of the Petitioner to compare the procurement of GUVNL at peak hours and during high demand to claim that the solar thermal power would be cheaper is misconceived. If the Petitioner had completed the project in time, the supply of electricity could have been used. However, the project of the Petitioner is delayed since long. Further, if the power purchase agreements are to be entered to meet the demand, then the solar power is available at much lower tariffs and the Petitioner's project has become much more expensive.

11.16. That the Petitioner cannot embroiled this Commission in its dealing with its lenders. Also, the Commission in its Order dated 07.12.2018 has upheld the applicability of principles Res Judicata in regard to the earlier orders, which is not challenged by either party. The Petitioner is contending that if the Respondent GUVNL's submissions are accepted, there will be a bar on Statute by way of contract without disclosing which Statute is being sought to be barred. The grounds of this Petition are different from earlier petitions has been stated by the Petitioner in each of its Petition and there is no dearth of the Petitioner's imagination to come up with new reasons every time. That the Petitioner is relying upon Suo Motu Order dated

23.03.2020 passed by the Hon'ble Supreme Court extending limitation to file claims and litigations between 15.03.2020 and 28.02.2022. But the Petitioner has filed the present Petition on 13.09.2019. Therefore, it is not clear how the Hon'ble Supreme Court's Order would help the Petitioner in the present case. There is no force majeure since the issues with finances and sub-contractors and late deliveries or unavailability of equipment, material etc. are excluded from force majeure under the PPA. It is further submitted that the Hon'ble Commission in its Order dated 07.12.2018 has held that issues of financing do not fall under force majeure event.

11.17. That the Petitioner has relied on the Judgment of the Hon'ble Supreme Court in the case of *MP Power Management Company Limited V/s. Renew Clean Energy Pvt. Limited [(2018) 6 SCC 157]* to claim that termination of contract is not fair even if the delay in commissioning due to unavoidable circumstances but not force majeure because there are heavy investments. The said judgment is not applicable to the facts of present case as the issue therein related to the termination of contract when the project was at the final stage of commissioning, which is not the case herein. The project has not made any progress since last 12 years. Further, the issue therein was related to change in location which is also not the case here and the extension was sought only once and delay was only for a few days in the matter therein. In the present case, the Petitioner has already been granted repeated extensions by this Hon'ble Commission and despite completion of more than 12 years since the original PPA was signed, there is no progress on the ground and the project has not even commenced let alone nearing commissioning. Even now the Petitioner is seeking 24 months and more. In fact, considering the last extension granted until 31.12.2019, it has been more than 2.5 years and still there is no construction on ground. In such situation, it would be unfair to not allow GUVNL for termination of the PPA with the Petitioner.

11.18. With regard to contention of the Petitioner that after the Supplementary PPA dated 26.02.2019 with the Respondent, the Petitioner was left with only 10 months to achieve financial closure and completion of the project, However, this fact however was known to the Petitioner at the time of signing of the Supplementary PPA and is not a new fact.

11.19. It is also stated by the Respondent GUVNL that the Petitioner has accepted the Order dated 07.12.2018 passed by this Commission including the timelines of the extension till 31.12.2019 and the same has never been challenged by the Petitioner wherein the Commission has specifically denied the extension of SCOD for more than a year and held that the extension till 31.12.2019 should suffice. In the Order dated 07.12.2018, there was no direction to execute the Supplementary PPA and the time extension had already been granted till 31.12.2019. There was no need for the Petitioner to wait for signing of the Supplementary PPA. Since the time extension till 31.12.2019 was granted from the date of the Order dated 07.12.2018 and now the Petitioner cannot say that the time has to be counted from the date of Supplementary PPA and not from the date of Order.

11.20. There was no delay caused on account of the Respondent GUVNL, but it is the Petitioner who did not take timely and necessary steps for the execution of Supplementary PPA. The Petitioner had approached the Respondent GUVNL for signing of Supplementary PPA on 10.12.2018 and 27.12.2018 respectively. The Respondent GUVNL has sent the Supplementary PPA on 17.01.2019 to be signed to the Petitioner and it took more than a month to Petitioner to sign the same. It is also to note that it took lesser time for the Respondent GUVNL to draft the Supplementary PPA in comparison to the Petitioner who have to only agree to the draft even though the Petitioner was in a hurry to execute the same. The issues of the financial closure to be achieved by the Petitioner are not relevant to the Respondent GUVNL and the requirement of lenders for further 24 months extension cannot be a ground to seek a discretionary relief from this Commission.

11.21. That the Petitioner had never raised the issue of alleged vendor development and finalization but in fact, the Petitioner had claimed that it had already placed many work orders and procured equipments which have already been received at project site. Therefore, it is not clear how there is an issue of vendor development or its finalization because the issues of vendor development etc. have to be kept in mind prior to entering into an agreement or even otherwise it should have been raised when earlier extensions were sought. It is also not clear as to why the Petitioner is still sourcing material and needs EPC Contractor when it has already incurred Rs. 211 crores and now in the present Petition claimed Rs. 221.23 crores and claimed

to have procured equipment/plant etc. On one hand, the Petitioner claims that it had ordered all the long lead equipment and that are received at project site or are ready for delivery and yet the Petitioner is still visiting & talking to EPC contractor in China. Again and again, the Petitioner has raised an issue with regard to its financing when this Commission in the Order dated 07.12.2018 had already held that issues of financing do not fall under force majeure event.

11.22. In view of the above submissions, it is submitted that there is no merit in the Petition filed by the Petitioner and the same is liable to be dismissed with costs.

12. The main Petition alongwith allied IAs was heard by us at length on 23.06.2022.

Arguments (Applicant/Petitioner):

13. Heard Ld. Adv. Mr. Varun Chopra, appearing on behalf of the Petitioner/Applicant, reiterating the facts as stated above and also argued the matter while referring to provisions of the PPA, factual aspects, relevant judgments and completed the submissions and arguments.

13.1. It is submitted that the Petitioner is developing a Solar Thermal Power Project in the State of Gujarat which uses renewable solar resources to generate electricity and the project being developed by the Petitioner is based on Solar Thermal Power Technology with molten salt based thermal storage system is new technology and being implemented for the first time in the country. It requires a minimum period of 18-24 months, per se 24 months for setting up the project. Therefore, the Petitioner has approached this Commission through the present Petition seeking indulgence and support from the Commission.

13.2. After referring the letter dated 07.05.2019 issued by SBI, it is submitted that the Petitioner approached the Respondent for extending the period of Scheduled Commercial Operation Date (SCOD) up to 31.12.2019 and execution of Supplemental PPA but the Respondent had signed the Supplemental PPA with the Petitioner on 26.02.2019 i.e. after a period of approximately 3 months after the Order of the Commission. Thus, the Petitioner having only a period of 10 months out of 12 months granted by the Commission in place of 18 months as per provisions of the PPA. It is further submitted that the Petitioner has submitted progress reports

to the Commission from time to time and also apprise the progress of the project to the Respondent at regular intervals in compliance to directives given by the Commission in Order dated 07.12.2018.

- 13.3. It is further submitted that during the pendency of present Petition, the Petitioner has filed IA No. 03 of 2021 for amending/replacing the prayer clauses of present Petition since the Petitioner is unable to complete the power project due to Force Majeure Event and COVID-19 pandemic. It is submitted that the Hon'ble Supreme Court in its judgment, has also granted the blanket extension after considering the difficulties posed by Covid-19 pandemic.
- 13.4. In reply to query of the current status of the project, it is submitted that the Petitioner has already made substantial investment towards the project and in order to commissioning of the project in timely manner the Petitioner has placed various orders with various reputed international companies. It is submitted that Orders were placed in FY 2011-12 and FY 2012-13, the material is not received by the Petitioner.
- 13.5. It is submitted that the Petitioner is currently facing difficulty in achieving financial closure because after signing of the Supplemental PPA on 26.02.2019 by the Respondent after delay of around 3 months, the Petitioner approached their lender State Bank of India for sanction of debt for the 25 MW Solar Thermal Project. However, the same is not being sanctioned on the ground that the Supplemental PPA does not provide 18 months period for achieving commercial operation and the bank cannot approve the debt with less construction period. It is further submitted that the present Petition alongwith IAs have only been filed by the Petitioner with a limited prayer of seeking extension of SCOD on account of requirement of the lenders insistence to have clear time period of 18 to 24 months for construction of the project and extension of SCOD while refraining the Respondents from encashment of PBG. It is submitted that the Petitioner is serious about setting up the project and therefore, the Petitioner has invested around Rs. 221 Crore in the project and their intentions are bonafide.
- 13.6. It is submitted that there is delay in setting up the 25 MW Solar Thermal Power Project after signing of Supplemental PPA on 26.02.2019, since the financial closure

could not be achieved as the financial institutions are insisting for at least 24 months for achieving commercial operation after completion of the construction, testing, commissioning etc. of the project prior to financing the project. Therefore, the Petitioner humbly requests the Commission to grant extension of the time limit for achieving SCOD by a period of 24 months plus 6 months that have elapsed on account of COVID-19 pandemic.

Arguments (Respondent):

14. Ld. Adv. on behalf of the Respondent GUVNL objecting to the extension sought by the Petitioner submitted that the Commission in its Order dated 07.12.2018 in Petition No. 1608 of 2016 after considering the objections of GUVNL, the request of Petitioner and other submissions made by both parties decided to grant extension to the Petitioner for achieving SCOD by one year i.e., up to 31.12.2019. In the said proceedings the Petitioner had originally sought an extension up to 31.12.2018 but subsequently during the course of proceedings sought further extension. It is also recorded in the aforesaid Order that although, extension of 18 months is sought by the Petitioner, the Commission decided to grant extension of one year as a last opportunity with a direction that the financial closure and all other required activities for commissioning the project are to be achieved within extended time period. Thus, the Scheduled Commercial Operation Date is not extended by the Commission beyond 31.12.2019.
- 14.1. It is submitted that the Petitioner has not challenged the aforesaid Order dated 07.12.2018 of the Commission either by filing any Review Petition before this Commission or filing any appeal before Hon'ble APTEL. Therefore, the Order dated 07.12.2018 of the Commission has attained finality as the Commission has already granted an extension of 12 months as against 18 months requested by the Petitioner.
- 14.2. With regard to contention of the Petitioner that the Respondent has delayed the execution of the Supplemental PPA, it is submitted that the Commission has only granted the extension of SCOD upto 31.12.2019 and there is no such directives of the Commission to execute the Supplemental PPA with the Respondent. Further, alleged delay in the signing of the Supplemental PPA is also not relevant in view of the fact that the same has not been raised by the Petitioner during the signing of the

Supplemental PPA. It is submitted that the Petitioner in its previous Petition has sought the extension of 18 months from date of disposal of the aforesaid Petition and not from the date of signing of Supplemental PPA. As such, the Petitioner has approached the Respondent on 10.12.2018 and 27.12.2018 for Supplemental PPA which was sent to the Petitioner on 17.01.2019 and the Petitioner took more than one month to sign the same. It is further submitted that the Petitioner had agreed to the terms of the Supplemental PPA including SCOD of 31.12.2019 and that no further extension would be sought. As the Petitioner had willingly executed the Supplemental PPA without raising any issue on the delay in execution of the Supplemental PPA, it cannot now claim that there was any delay and sought the extension on such ground.

14.3. It is further submitted that the Power Purchase Agreement was signed in 30.04.2010 by the Petitioner adopted the tariff determined by the Commission in its Order No. 02 of 2010 dated 29.01.2010. In the said tariff Order, the Commission has not determined the tariff for the Solar Thermal Projects with storage. Further, the gestation period recognized for Solar Thermal Project considered is about 18 months and even the Petitioner in Petition No. 1608 of 2016 has recognized the gestation period as 18 months. The project has been going on since 2010 but what they now want is clear period of 24 months which is more than 18 months and which also means that for last 12 years, the Petitioner has done nothing. Now they want completely a fresh period of 24 months when the PPA was signed in 2010. The Petitioner says that they have placed work orders, they have acquired land, equipment's have come, spent around Rs. 230 Crore, whereas as per that Order the Capital Cost would be a certain amount out of which they have invested equity amount of Rs. 232 Crore. Despite all these having happened since 2010 they now need more time of 24 months.

14.4. Referring to Order dated 07.12.2018 in Petition No. 1608 of 2016 passed by the Commission, it is further submitted that the Commission has specifically mentioned that extension up to 31.12.2019 is granted as 'last chance' to the Petitioner and the same is accepted by the Petitioner and therefore, executed Supplemental PPA with the Respondent. It is submitted that the Petitioner is now saying that the Petitioner is not asking for extension, but their Banks/Financial Institutions and EPC

contractors are asking for extension of SCOD is not ground for seeking the extension. The PPA is a concluded contract between the Petitioner and the Respondent. Therefore, the Commission is concerned with the Petitioner M/s Cargo Solar and what their Bankers say or what their EPC contractors do is of no concern for the Commission since the Petitioner as Developer did not think that the Order dated 07.12.2018 granting one year extension was not possible for them to perform. The Respondent is not concerned about the desirability of Petitioner's lenders/financial institutions or EPC contractor etc. It is submitted that the PPA was signed in 2010 and if the Petitioner had taken timely actions, then such situation would not have arisen. Now, through the present Petition before the Commission the Petitioner is seeking fresh time period of 24 months saying that the Petitioner does not want extension but his lenders are insisting for the same and hence approached the Commission. It is also submitted that as per present Petition, it transpires that the Petitioner has not made any progress during the period after Order dated 07.12.2018. The only progress the Petitioner has made during the period is to approach various financial institutions which they are doing since signing of the PPA i.e. 30.04.2010.

- 14.5. It is also submitted that financing issues do not qualify as 'Force Majeure' as per Order dated 07.12.2018 in Petition No. 1608 of 2016 wherein the Commission has categorically held that non-achievement of financial closure as force majeure event is not acceptable. Therefore, now it is not permissible for the Petitioner to come up before this Commission seeking extension when the Order dated 07.12.2018 of the Commission is clear and unambiguous about 'last opportunity', Financial Closure not covered under 'Force Majeure' etc.
- 14.6. In response to issue of Covid pandemic raised by the Petitioner, it is submitted that there is no question of six months extension due to COVID-19 pandemic occurring at a later stage beyond 31.12.2019 i.e., after expiry of extended time period of 31.12.2019 and therefore any issues due to Covid -19 cannot be claimed as reasons for delay.
- 14.7. Based on the above, Ld. Adv. for the Respondent GUVNL submitted that there are no new grounds in the Petition to obtain the extension of SCOD of the project as the

Petitioner has already obtained the extension in the SCOD etc. on the same grounds in its previous petitions. Hence, the Commission may dismiss the Petition filed by the Petitioner as the Petitioner is not entitled to get extension of time for its project. It is also requested that the Commission may reserve the matter for Order by directing the parties to file their written submissions and accordingly to pass an appropriate order in the matter.

Further Arguments (Applicant/Petitioner):

15. In response to the above, Ld. Adv. for the Petitioner, reiterated that the technology adopted for the project is unique in nature having much more benefits and that it has been made clear in the present Petition by the Petitioner that the Petitioner is not raising any issues which were subject matters of previous petitions before the Commission. Therefore, the Respondent is unnecessarily linking such issues in the present Petition.
- 15.1. It is further submitted that the Petitioner has already submitted bank guarantee to the Respondent which is valid up to March 2025. It is submitted that the Petitioner is seeking extension of SCOD only because there is delayed on the part of the Respondent in signing Supplemental PPA with the Petitioner and there is lack of interest on part of financial institutions and EPC contractors with the current SCOD of 31.12.2019 as the lenders requires time period of 18 to 24 months for completion of construction of the project and that the Petitioner has already invested around Rs. 221 Crore in the project to which CA certificate has also been filed by the Petitioner.

ANALYSIS & CONCLUSION:

16. Based on the above, we now proceed to decide the issues arising for consideration by the Commission and reliefs as sought by the Petitioner duly taking in to account the pleadings, all the written submissions and replies made thereon including the arguments oral and written made by the Ld. counsels for the parties, provisions of PPA, Orders passed by the Commission in matters previously filed by the Petitioner, respective judgments relied by the parties.
- 16.1. The Petitioner by way of present Petition had originally sought approval and

adjudication of dispute under Section 86 (1) (f) of the Electricity Act, 2003 in terms of the Power Purchase Agreement dated 30.04.2010 executed between the parties for generation & supply of electricity from 25 MW Solar Thermal Power Project regarding extension of the date of Construction Default and Schedule Commercial Operation Date from 31.12.2019 to 31.12.2021. That apart, the Petitioner had thereafter filed applications in present Petition under Section 94 of the Electricity Act, 2003 being (i) I.A. No. 14 of 2019 seeking interim Order restraining the Respondent from invoking/encashing the Bank Guarantee during the pendency of the Petition and (ii) IA No. 03 of 2021 praying to allow amending prayer clause of original Petition. Thus, the dispute pertains to extension of date of Construction Default, Scheduled Commercial Operation Date (SCOD), achieving Commercial Operation, Non-levy of the liquidated damages, etc.

16.2. It is pertinent to note that the Petitioner had agreed with Scheduled Commercial Operation Date (SCOD) as 31.12.2011 in the Power Purchase Agreement (PPA) executed on 30.04.2010 with the Respondent for establishing, constructing, commissioning of aforesaid project so as to supply power generated from the Solar Thermal project to the Respondent GUVNL. However, subsequently, in Petitions filed the Petitioner, the said SCOD has been extended several times through different Orders passed by this Commission being Petition Nos. (i) 1125 of 2011; (ii) 1333 of 2013; (iii) 1513 of 2015; and lastly in (iv) 1608 of 2016 vide Order dated 07.12.2018 upto 31.12.2019. Accordingly, as per the decision of the Commission in above Orders, the parties have consequentially executed Supplemental PPAs.

16.3. It is noted that during the hearing before previous bench of this Commission the validity of Bank Guarantee that was available with Respondent being up to 31.12.2019, the Commission decided and directed the Respondent GUVNL to restrain from invoking/encashing the existing Bank Guarantee of the Petitioner valid up to 31.12.2019 subject to the condition that the Petitioner extends the validity of existing Bank Guarantee of Yes Bank up to 31.03.2020 and submits the same to the Respondent on same day i.e. 31.12.2019 before closing hours of Respondent's bank along with a legal undertaking to provide another Bank Guarantee of equivalent amount valid up to 31.03.2020 of other approved bank from amongst the list of approved banks of Government of Gujarat to the Respondent in

lieu of Bank Guarantee of Yes Bank within a period of one week i.e. on or before 07.01.2020.

- 16.4. Previously, the Petitioner on 07.09.2016 by way of Petition No. 1608 of 2016 had prayed the Commission for further extension of period for achieving SCOD, construction default upto 31.12.2018 including non-levy of liquidated damages and through an affidavit dated 23.08.2018 in said Petition, the Petitioner had also undertaken not to approach any authority in future for seeking further extension. Eventually, the Commission passed an Order dated 07.12.2018 in aforesaid Petition extending the SCOD upto 31.12.2019 and while granting extension to the Petitioner, it has been held by the Commission as under:

“15.36. We note that the original SCOD, Commercial Operation Date, Construction Default Date of the plant was 31.12.2011 but the same was delayed due to the non-receipt of statutory approvals as contended by the Petitioner. The Commission has granted extension of the SCOD from time to time in the earlier proceedings with the last extension up to 30.06.2017. The Petitioner has now prayed for extension of the SCOD up to 31.12.2018. If the extension is granted upto 31.12.2018 as prayed by the Petitioner, hardly any time will be left with the Petitioner to achieve the SCOD and the fact remains that the Petitioner is yet to get approval under Section 89 A of the Bombay Tenancy Act for the balance land, achieve financial closure, start construction activities etc. The Petitioner has filed an affidavit dated 23.08.2018 requesting the Commission to grant extension of SCOD, construction default and non-levy of LD for a period of 18 months from the date of final disposal of the present petition and has undertaken not to approach any authority in future for seeking further extension.

15.37. The Petitioner has submitted that it is setting up the Solar Thermal Power Project which has the benefit of continuous reliable power supply and also a new technology based first of its kind project in the State of Gujarat and has also initiated various project related activities like procurement of land, equipments, placed work orders for equipments, work orders for services etc. However, the Commission is also concerned about the inordinate delay in

achieving the SCOD of the project. In view of this delay and the fact that the Petitioner is yet to get the 89A approval, the ownership of the land for which MoU is executed and also certain parcels of land for which neither any MoU nor any sale deed exists, the Commission is of the view that unless these are in place without further delay, any extension of SCOD for more than a year would not be appropriate. We therefore decide to give one last opportunity to the Petitioner and extend the SCOD up to 31.12.2019.

.....

16. In view of the above, we decide that the present petition succeeds. We decide that force majeure events occurred in the Petitioner's case. Since the Petitioner has not received all the permissions under Section 89 A which is mandatory to start the plant activity, the period of SCOD be extended up to 31.12.2019. In the past, the Commission has already given a number of extensions to the Petitioner, it is, therefore, necessary that the Petitioner completes the project by achieving the financial closure and obtaining all the statutory approvals and ownership of the land within this extended period. The Petitioner is directed to ensure the progress of the project and keep the Commission and the Respondent informed about the same at regular monthly intervals. We also decide and direct the Petitioner to provide Bank Guarantee to the Respondent with validity up to 3 months after the revised SCOD in terms of this order. We also decide that the other terms and conditions of the PPA shall remain unchanged."

- 16.5. Thus, in aforesaid Order, the Commission has specifically decided to give one last opportunity to the Petitioner while granting extension upto 31.12.2019. It is further observed by the Commission in said Order that in the past the Commission has already given number of extensions to the Petitioner and it is therefore, necessary that the Petitioner completes the project by achieving the financial closure and obtaining all the statutory approvals and ownership of the land within the extended period of SCOD. This Order dated 07.12.2018 in Petition No. 1608 of 2016 has not been challenged by any of the parties and has thus attained finality. It is accordingly evident that the Commission in previous proceedings having decided to give one last opportunity to the Petitioner of extending the SCOD and assuming that if any

extension is now granted by this Commission after passing of aforesaid Order with consideration of the decision therein, then in that case the phrase ‘*We therefore decide to give one last opportunity to the Petitioner*’ shall become otiose and the purpose of mentioning the same at relevant point of time may become redundant.

16.6. Pursuant to above Order passed by the Commission, the Petitioner and the Respondent also entered into a Supplementary Power Purchase Agreement (SPPA) dated 26.02.2019 amongst others providing for the following:

“F. M/s. CSPGPL filed another Petition before GERC being Petition No.1608/2016 seeking extension up to 31.12.2019. GERC vide Order dated 7.12.2018 has allowed the petition inter alia on the ground that M/s. CSPGPL has given assurance to complete and commission the solar thermal project by 31.12.2019. Accordingly, GERC considered to give last opportunity to M/s. CSPGPL and extended SCOD up to 31.12.2019 without changing other items and conditions of the PPA. Further, GERC has specifically clarified that the extension granted up to 31.12.2019 would be the last extension and M/s. CSPGPL has to complete the project by undertaking all necessary activities including achieving the financial closure, obtaining all necessary statutory approvals and ownership of the land within this extended period. In the Order dated 7.12.2018, GERC has also directed M/s. CSPGPL to ensure the progress of the project and keep GERC and GUVNL be informed about the progress on monthly interval. M/s. CSPGPL have to keep Bank Guarantee valid up to 3 months after revised SCOD i.e. up to 31.3.2020.

.....

2.0 The Scheduled Commercial Operation Date mentioned as “30th June 2017” in the Power Purchase Agreement dated 30th April 2010 read with Supplemental agreement dated 21.9.2015 shall be replaced by “31st December 2019”, subject to the following terms and conditions:

(a) M/s. CSPGPL shall commission the solar thermal project by 31.12.2019 and no further extension shall be allowed beyond 31.12.2019.

(b) M/s. CSPGPL shall ensure the progress of the project and keep GERC and GUVNL be informed about the progress at monthly interval.

(c) *M/s. CSPGPL shall keep Bank Guarantee valid up to 31.3.2020 as decided in the GERC Order dated 7.12.2018.*

(d) *The other terms and conditions of the PPA read with the Supplemental agreements shall remain unchanged including tariff. M/s. CSPGPL shall not ask for increase in tariff or shall not agitate tariff issues before any forum for whatsoever reasons, at later stage."*

- 16.7. From bare perusal of above Supplemental PPA, it emerges that the parties had accepted the revised SCOD as 31.12.2019 duly incorporating the same into a contract, which is binding on the parties. Further, in aforesaid Supplemental PPA, it is also agreed between the parties that the Petitioner shall commission the Solar Thermal project by 31.12.2019 and no further extension shall be allowed beyond 31.12.2019.
- 16.8. Despite above, as already noted above, the Petitioner, has filed the present Petition as well as IAs. It is also categorically submitted by the Petitioner in the pleading & oral submissions that the present Petition is not premised on any of the earlier issues and is not based on the grounds raised in previous rounds of litigation before this Commission and the Petitioner is seeking further extension *inter alia* on the ground that the project has been delayed due to lack of interest on part of the financial institutions and EPC contractors on account of time period that was available with consideration of the SCOD as 31.12.2019. Moreover, the bank(s), financial institution/lenders and EPC contractors, whom the Petitioner approached required a duly signed PPA having further extension of 24 months in achieving the SCOD. Also, there was delay on part of the Respondent in signing the Supplemental PPA.
- 16.9. Thus, according to submissions made by the Petitioner, the Solar project could not be commissioned in terms of the extension till 31.12.2019 on account of force majeure events and has accordingly sought further extension of SCOD beyond 31.12.2019 granted by the Commission. The Petitioner has initially sought extension till 31.12.2021 in original Petition but during the pendency of the said Petition, the Petitioner through IA No. 03 of 2021 has sought extension of 24 months plus 6 months on account of COVID from date of disposal of the Petition or order of the

Commission. The Petitioner / Applicant has broadly raised the following reasons in support of its claim for seeking further extension of time in above matters:

- (a). Financing of the project and issues with lenders/contractors insisting for extension of 24 months for achieving commercial operation;
- (b). Delay on the part of GUVNL in executing SPPA and;
- (c). COVID-19.

16.10. Accordingly, we now deal with different grounds / reasons advanced by the Petitioner for seeking extension as noted above. Since, the Petitioner has premised further extension on basis of Force Majeure events, it is necessary to refer the relevant provisions regarding 'Force Majeure'. The PPA provides in Article 8 for the force majeure and its exclusions. Article 8.1 (a) pertaining to force majeure events reads as under:

"8.1 Force Majeure Events:

(a) 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 circumstance (a "Force Majeure Event") beyond the reasonable control of the Party experiencing such delay or failure, inducing the occurrence of any of the following:

(i) acts of God;

(ii) typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;

(iii) acts of war (whether declared or undeclared), invasion or civil unrest;

(iv) 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 GUVNL of any Law or any of the respective obligations under this Agreement);

(v) inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;

(vii) earthquakes, explosions, accidents, landslides; fire;

(vii) expropriation and/or compulsory acquisition of the Project in whole or in part by Government Instrumentality;
(viii) chemical or radioactive contamination or ionising radiation;; or
(ix) damage to or breakdown of transmission facilities of GETCO/DISCOMs;
(x) exceptionally adverse weather condition which are in excess of the statistical measure of the last hundred (100) years.”

16.11. In terms of the above Article, in order to constitute a force majeure event, the event has to be beyond the reasonable control of the party of the nature specified under sub-clauses (i) to (x) of Article 8.1(a) quoted above. Therefore, any event, *ipso facto* cannot be claimed to be a force majeure event for the purposes of Article 8.1(a) unless the delay or failure is established to be on account of occurrence of such event.

16.12. Further, on the aspect of financing of the project by SBI /PFC & EPC contractors of China approached in March-2019 and insistence of clear 24 months' time period for SCOD by the lenders/financial institutions & EPC contractors, it is submitted that the Petitioner approached State Bank of India with whom the Petitioner had several meetings for arranging financial closure being lead bank and also with other financial institutions/lenders seeking sanction of debt funding for setting up the 25 MW Solar Thermal Power Project. That the Petitioner vide letter dated 29.04.2019 addressed to State Bank of India (SBI) requested for sanction of credit facility for the project but SBI vide its letter dated 07.05.2019 conveyed to the Petitioner that on the advice of Lender's Independent Engineer minimum timelines for completion of the project was 18 months and approximately 6 months' time would be required to revalidate or seek fresh sanctions of credit facilities from various banks and hence 7 months period was not sufficient for achieving financial closure and completion of the project. Thus, it had been advised to get extension of SCOD with sufficient timelines of approximately 24 months for which the Petitioner has approached this Commission.

16.13. It is also submitted that the Petitioner's team visited China in March 2019 for exploring EPC contract and sourcing of material for the project, but the Chinese EPC contractors were not comfortable with short project timeline upto December-2019

and requested to provide minimum 22 months SCOD for implementation of the project. Even, the Respondent GUVNL was requested in August-2019 to extend and sign fresh Supplemental PPA with 24 months highlighting the impediments faced in achieving financial closure and completion of the project but the Respondent rejected said request while directing the Petitioner to complete the project by 31.12.2019. The Petitioner had subsequently also approached another leading financial institution being Power Finance Corporation (PFC) and PFC by its letters dated 15.01.2020 and 04.07.2022 has conveyed to the Petitioner that 24 months period is pre-requisite for providing financial assistance for the project and advised to get further extension of two years. The Petitioner has also highlighted that according to data of National Renewable Energy Laboratory (NREL), United States, the minimum time taken to complete a project with storage by Termasol, Spain having strong expertise in thermal solar is 24 months and the maximum time taken was 52 months by Delingha, China, which was the first thermal power plant in China.

16.14. Per contra, the Respondent GUVNL has opposed these matters on various grounds contending that there are no force majeure events, or any circumstances occurred subsequent to passing of the Order dated 07.12.2018, which justifies any further extension because the Petitioner has categorically stated in the Petition that extension is not sought in regard to land and land related issues. Also, the Commission in its Order dated 07.12.2018 after considering all the relevant factors in question has already granted an extension of SCOD as last chance to the Petitioner from the original SCOD of 31.12.2011 as per PPA dated 30.04.2010 up to 31.12.2019, which is already over. Since the issue regarding financing has already been dealt by the Commission in said Order, the principle of res judicata applies and GUVNL has no obligation to deal with the financial institutions and contractors of the Petitioner since it is the responsibility & obligation of the Petitioner to achieve financial closure as per the provisions of the PPA and to commission the project by ensuring timely appointment of EPC & other contractors. Any failure to do so cannot be considered as valid reason for seeking further extension of time.

16.15. It is also contended that pursuant to above Order dated 07.12.2018, the Petitioner had willingly executed aforesaid Supplemental PPA without raising any issue and that the Petitioner has not raised any claim in these matters for setting aside the

terms & conditions of the Supplemental PPA although there was no specific direction in said Order to execute the Supplementary PPA within any time frame. Hence, it is not open to the Petitioner to thereafter act contrary to the agreed terms & conditions in the Supplemental PPA by seeking further extension. It is contended that the Petitioner cannot act contrary to the Contract because it is well settled principle that the terms of the contract are binding and the parties cannot go beyond the terms of the Contract for which the Respondent GUVNL has relied on decisions of the Hon'ble Supreme court viz. (i) [AIR 1977 SC 509], (ii) [(2016) 11 SCC 182] & (iii) [(2017) 16 SCC 498]. It is also contended that issues of financing or non-achievement of financial closure is not a 'Force Majeure' event and no extension can be considered on basis of same. The Respondent GUVNL has relied on the decision of the Hon'ble Tribunal in the case of *Taxus Infrastructure* and Order dated 07.12.2018 passed by this Commission.

16.16. It is also contended by the Respondent GUVNL that having agreed to the terms & conditions in the Supplemental PPA, the Petitioner cannot claim any extension now, more particularly after having specifically agreed in the contract with the clause that no further extension will be granted and with consideration of 'last chance' decided by the Commission in its Order dated 07.12.2018 in Petitioner No. 1608 of 2016.

16.17. We note that the Scheduled Commercial Operation Date (SCOD) under the PPA dated 30.04.2010 was stipulated as 20 months from signing of said PPA and it was at the instance of the Petitioner in different Petitions filed before this Commission that extension of SCOD has been granted from time to time as under:

- (a) Initially, for 19 months up to 31.07.2013 vide Order dated 07.04.2012 in the Petition No. 1125 of 2011;
- (b) Thereafter, extension in COD up to 31.12.2015 vide Order dated 5.5.2015 in the Petition No. 1333 of 2013;
- (c) Extension up to 30.06.2017 vide Order dated 31.07.2015 passed in Petition No 1513 of 2015; and
- (d) Further extension up to 31.12.2019 vide Order dated 07.12.2018 passed in the Petition No. 1608 of 2016.

16.18. It is also necessary to refer Article 8.1 (b) of the PPA entered between the parties

pertaining to 'Force Majeure Exclusions', which reads as under:

"(b) 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, equipments, materials, spare parts or consumables for the project;

2. Delay in performance of any contractor/sub contractor or their agents.

.....

5. In efficiency of finances or funds or the agreement becoming onerous to perform."

16.19. Above Article 8.1 (b), clearly states that non-arrangement or inability in arranging finances or funds for the project is an exclusion from claiming force majeure except to the extent that it is consequence of force majeure. In the present matter, the Petitioner has not been able to convincingly prove on basis of any material evidence or document that finances or funding for the project was not possible due to force majeure events. It is not the case of the Petitioner that any force majeure event occurred which consequentially prevented in achieving financial closure or engaging EPC contractor. Nothing is proved by the Petitioner as force majeure event which eventually resulted in inefficiency of finances or unavailability of plant & machinery or delay in performance of EPC / other contractors etc.

16.20. Pursuant to signing of PPA way back on 30.04.2010 with the Respondent GUVNL for the Solar project, it was for the Petitioner to achieve financial closure within six months from aforesaid date as per the provisions of the PPA and thereby arrange necessary funding and financing required for setting up the project. The responsibility to arrange requisite debt financing / loan from the banks / lenders / financial institutions is of the Petitioner apart from infusing its own equity and therefore, during the period from 2010 onwards, it was for the Petitioner to arrange its affairs and deal with the financial institutions, lenders or banks to get requisite loan amount sanctioned / disbursed. The term 'Financial Closure' is defined in Article 1 (Definitions) of the PPA, which reads as under:

"Financial Closure means the signing of the Financing Documents for financing of

the Project and fulfilment of all the conditions precedent to the initial availability of funds there under and the receipt of commitments for such equity as required by the Power Producer in order to satisfy the requirements of the lenders provided however that the Power Producers has immediate access to funds (subject to giving drawdown notices) required as adequate by the Power Producer and in any case shall be achieved within 6 (six) months from the date of signing of this Agreement.”

16.21. As per the PPA between the Petitioner and the Respondent GUVNL, it is the responsibility and obligation of the Petitioner to set up the project as per the terms of PPA by arranging necessary project financing. As per above definition, wherein the word 'shall' is used for achieving financial closure within 6 months from the date of signing of the PPA. Hence, it was mandatory for the Petitioner to achieve the same as stipulated. Moreover, Supplemental PPA executed between the parties is also an integral part of PPA. The Respondent GUVNL has no obligation to deal with the financial institutions since it is entirely the responsibility of the Petitioner. It needs to be noted that the Commission in its Order dated 07.12.2018 has held that issues of financing do not fall under force majeure event. Relevant portion of said Order reads as under:

“.....

15.9. Now we deal with issue No. (iii) as to whether non-disbursement of loan or non-achievement of financial closure qualifies as a force majeure event. We note that as per the Order No. 2 of 2010 dated 29.01.2010 and PPA dated 30.04.2010 signed between the parties it is the duty of the Petitioner to arrange for debt as well as equity for the project. Moreover, as per Article 8 of the PPA failure to achieve financial closure does not qualify as a force majeure event. It is incorrect to say that the non-availability of funds/debt or non-achievement of financial closure is a force majeure event. Article 8.1 (b) (5), of the PPA provides that inefficiency of finance or funds or the agreement becoming onerous to perform qualify as force majeure exclusion. Hence, the plea of the Petitioner to consider the non-achievement of financial closure as a force majeure event is not acceptable and the same is rejected.

.....”

16.22. The original PPA was executed in 2010 and thereafter, the Petitioner ought to have arranged the debt funding / loan within six months. However, it is not clear as to

why the Petitioner approached SBI / PFC or other lenders when the extended SCOD was upto 31.12.2019. No averment or reasons regarding the same are put-forth by the Petitioner in this regard or requirement to approach/apply to banks/lenders and that too after signing the Supplemental PPA because the Supplemental PPA was executed for the limited purpose of extension in Construction default, SCOD etc. in terms of the Order passed by this Commission.

16.23. Even, the Hon'ble APTEL in the case of *Taxus Infrastructure & Power Project Limited V/s. Gujarat Urja Vikas Nigam Limited & Ors.* in Appeal No. 131 of 2015 dated 04.07.2018 has decided that the issue of financing cannot be considered as Force Majeure event and no extension can be considered on that basis. It is necessary to refer the relevant portion, which reads as under:

“.....

12.....

r) Further, it is observed that the issue related to financing has been excluded from the FM events and also the litigation before the High Court has not delayed the process of construction of the Solar Project as at any point of time there was no specific direction of High Court or the State Commission to stop the work at site and also it is seen that during the litigation process the work was continued at the site by Taxus.

Hence, the claim made by Taxus for declaring delay in granting loan by IREDA and litigation period as FM event is not sustainable and it is liable to be rejected.

.....”

16.24. We note that the Petitioner has relied on the judgment of the Hon'ble Supreme Court in *MP Power Management Company Limited v. Renew Clean Energy Pvt. Ltd. [(2018) 6 SCC 157]* to claim that termination of contract is not fair even if there is no force majeure and delay in commissioning is due to unavoidable circumstances because investments are made. However, the said judgment is not applicable in the facts & circumstances of present case because in that case the Hon'ble Apex Court after noting that the project had reached an advanced stage of commissioning by 31.08.2017 whereas in present case it is not that the project is at an advanced stage

of commissioning since practically there is nothing on ground at project site.

16.25. The other issue raised by the Petitioner for seeking extension is that the EPC contractors in China whom the Petitioner had approached in March-2019 are also insisting for extension of 24 months in SCOD. At the outset, we fail to understand the requirement of the Petitioner approaching EPC contractors in China when the PPA was signed in the year 2010 with original SCOD being 31.12.2011 i.e. after lapse of 9 years. Also, Supplemental PPAs have been signed for extension of said SCOD from 31.12.2011 upto 31.12.2019. Moreover, on one hand it is submitted by the Petitioner that work / purchase orders for major long lead equipment's are already placed with (a) EPCM contractor with M/s IDOM, Spain, (b) Solar Field supply with M/s Schlaich Bergermann Partner (SBP), Germany, (c) Steam Turbine Generator (STG) from M/s GE, Italy (d) Steam Generator from M/s Aalborg CSP, Denmark, (e) Condenser from M/s CHEM Process, (f) HTF from M/s Lanxess, (g) Expansion Vessels from M/s Ravi Industries, (h) HTF Pumps from M/s Sulzer Pump, (i) Solar Field Assembly building form M/s Interarch Buildings etc. However, contrary to all these, on the other hand it is submitted that further time period of 24 months is required by its EPC contractor of China, when M/s IDOM, Spain is already claimed to be appointed as EPC contractor. It appears that as per the submissions of the Petitioner, project pre-development activities, placing Order for long lead equipment, major components etc. are completed and ready for dispatch to project site but in complete contrast to that, according to the Petitioner since the Chinese EPC contractor have insisted for further time, this Petition is preferred. Such self-contradictory submissions are self-defeating the plea advanced by the Petitioner.

16.26. The above referred Article 8.1 (b) not only excludes inefficiency of finance or funds or the agreement becoming onerous to perform to qualify as force majeure as already decided by the Commission in its Order dated 07.12.2018 passed in Petition No. 1608 of 2016 but also stipulates that delay in performance of any contractor/sub-contractor or their agents or unavailability, late delivery or change in cost of plants and machineries, equipment, materials, spare parts or consumables for the project to be excluded from Force Majeure. Said Article clearly specifies that issues with finances, contractors, sub-contractors, late deliveries or unavailability of equipment, material etc. are excluded from Force Majeure event under the PPA. We

note that during the previous proceedings, the Commission had not accepted the request for extension of 18 months from date of disposal of Petition and had granted timeline upto 31.12.2019. Also, the Commission in above Order, which has not been challenged has specifically denied the extension of SCOD for more than a year and held that the extension till 31.12.2019 should suffice. The Petitioner has accepted the said timeline upto 31.12.2019 in Supplemental PPA executed with GUVNL but is now claiming that the lenders or contractors are asking for more time. This cannot be sustained, more particularly because when a party agrees to a timeline in a contract but thereafter asks for extension on the basis that its lenders or contractor insisting for more time, which does not qualify as 'Force Majeure' as per the terms & conditions of the PPA executed. Hence, the same cannot be allowed more particularly with consideration of decision by this Commission in its aforesaid Order dated 07.12.2018 passed in Petition No. 1608 of 2016, which has attained its finality.

16.27. Even, the Petitioner has not provided submissions relevant to the specific query raised on the Supplemental PPA executed agreeing to the terms & timelines agreed therein but has merely reiterated the delay. The submission by the Petitioner regarding minimum time taken to complete a project with storage on basis of data of National Renewable Energy Laboratory (NREL), United States is not relevant because the same pertains to project in other countries at different locations which is dependent on many parameters, circumstance, issues etc. and therefore, the same cannot be simply co-related for consideration in the present case.

16.28. Considering the above including specific exclusion of the issues raised by the Petitioner regarding financing by the banks / lenders, EPC contractors, sub-contractors etc. from 'Force Majeure' and inordinate delay in achieving the SCOD of the project despite several extensions granted in past and having executed the Supplemental PPA / contract, wherein it is agreed by the Petitioner to commission the Solar Thermal Power project and achieve commercial operation of the project by 31.12.2019 with unambiguous condition that in case the same is not achieved then no further extension shall be allowed beyond 31.12.2019.

16.29. It is also submitted that as per Order dated 07.12.2018 passed by the Commission, the Petitioner has submitted monthly progress reports regarding the project.

However, in absence of any other submissions in this regard, it appears that the Petitioner may have conveyed such monthly progress reports which appear to be not more than twice would be in compliance to the directive of the Commission in an Order passed in previous proceedings. Merely submission in compliance of the directive by the Commission without any ground in support is of no avail to the Petitioner and accordingly it is not relevant to this matter.

16.30. We note that the Petitioner has also stated that extension is sought on the grounds of inaction / delay by State Government. However, the Petitioner has not provided any supporting documents or evidence in this regard to substantiate the said grounds of inaction or delay by the State Government. Also, the Petitioner has not specified any incident or issue on which there was any inaction or delay on part of the State Government. Therefore, in absence of same, we deem it appropriate to not consider the same for the reliefs sought herein.

16.31. Now we deal with the submissions made by the Petitioner for seeking relief because of delay in signing Supplemental PPA. On the aspect of the signing of the Supplementary PPA, it is the say of the Petitioner that despite all efforts the Supplemental PPA was signed by the Respondent on 26.02.2019 and till then there was non-cooperation by the Respondent. Also, in absence of Supplemental PPA no financial institution will examine the application for financing the project of the Petitioner. It is also submitted that since the Supplementary PPA was signed after lapse of few months after the date of Order dated 07.12.2018 in Petition No. 1608 of 2016, the Petitioner was only left with around 9-10 months to achieve SCOD which was completely insufficient.

16.32. We have considered the rival contentions amongst the parties on said aspect. We note that when the aforesaid Order was passed on 07.12.2018 with specific decision of SCOD extension up to 31.12.2019, the Petitioner was aware regarding the available timeline and it was for the Petitioner that all necessary steps are taken on all relevant fronts so that SCOD is achieved within the stipulated extension upto 31.12.2019. As already noted above, it is not clear as to why the Petitioner applied for sanction of debt/loan after passing of aforesaid Order. We also agree with the submission of GUVNL that the Petitioner despite being aware of SCOD date as

31.12.2019 at the time of signing of the Supplementary PPA and same being not a new fact has voluntarily executed the said contract when the time period left was only 10 months. The Petitioner has with open eyes signed the Supplementary PPA.

16.33. From the record it emerges that the Petitioner did approach the Respondent GUVNL seeking date & time for execution of the Supplementary PPA vide letters dated 10.12.2018 and 27.12.2018 and in response thereto, the Respondent GUVNL on 17.01.2019 sent the Supplementary PPA to the Petitioner to be signed amongst them but it took more than a month for the Petitioner to sign the same possibly because of differences amongst the parties on terms & conditions of the draft Supplementary PPA. It also emerges that time taken by GUVNL in this regard is less compared to the Petitioner. It is relevant to note that in the Order dated 07.12.2018 although there was no direction to execute the Supplementary PPA within any specific time period, but the time extension granted was only until 31.12.2019. Therefore, with given timelines, the Petitioner ought to have taken timely and necessary steps for the execution of Supplementary PPA. Also, the Petitioner could have taken up such other activities having no bearing with Supplemental PPA rather than waiting for signing of the Supplementary PPA.

16.34. Therefore, we decide that aforesaid reasons / grounds for seeking extension are not tenable, when the Order dated 07.12.2018 was with extension of SCOD upto 31.12.2019 and more particularly when the Petitioner has eventually executed Supplemental PPA and that too on 26.02.2019 being fully aware with the time period remaining while duly agreeing in said Agreement with SCOD of 31.12.2019 as well as clause that no further extension will be allowed. Accordingly, we decide to decline the relief sought by the Petitioner for seeking extension premised on the reasons / grounds raised that delayed signing of Supplemental PPA is force majeure event because of which it was not possible for the Petitioner to complete & commission the project by 31.12.2019. Moreover, it appears that there is hardly any construction done at project site by the Petitioner during all these years after signing of the PPA on 30.04.2010 and subsequent extensions on several occasions whereby the construction default / SCOD was eventually allowed until 31.12.2019.

16.35. It is also noted from the record that although the Petitioner is claiming force majeure

in these matters but the Petitioner has not issued any notice of force majeure as required under Article 8.1(c) of the PPA.

16.36. Firstly, as noted above, the Commission after hearing the parties and taking into consideration all the relevant aspects has passed an Order dated 07.12.2018 deciding to extend SCOD as a last chance to the Petitioner up to 31.12.2019. Secondly, the said Order has not been challenged and has accordingly attained finality and therefore, binding to the parties. Thirdly, after passing of above Order, the parties themselves have voluntarily executed Supplemental PPA wherein it is agreed to incorporate SCOD of 31.12.2019, which has reaffirmed the decision of the Commission in its above Order. Fourthly, the Commission in its Order dated 07.12.2018 has held that issues of financing do not fall under force majeure event in terms of Article 8.1 (b) of the PPA pertaining to 'Force Majeure' exclusions. Also, issues of contractors, sub-contractors or EPC contractors are covered in above Article 8.1.(b). Fifthly, even thereafter, in this Petition no appealing and cogent reasons and grounds have been presented before this Commission to consider further extension. Hence, we are of the view that the reliefs sought by the Petitioner cannot be granted. Accordingly, we decide not to grant the relief of extension of 24 months or more against the plea that bankers / lenders & EPC contractors or other contractors are insisting for minimum time period of 24 months or more for extending the SCOD beyond 31.12.2019.

16.37. Insofar as the claim of the Applicant/Petitioner in IA No. 03 of 2021 filed subsequently regarding COVID-19 pandemic having affected the implementation of the Project also needs to be considered, we note that the last extension of SCOD was granted by the Commission up to 31.12.2019 by its Order dated 07.12.2018 with a clear stipulation that the Commission has already given a number of extensions and it is necessary for the Petitioner to complete the project by 31.12.2019. It is in the above context that the Order dated 07.12.2018 specifically stipulated that the extension given upto 31.12.2019 is as a last opportunity to Petitioner. Further, the Petitioner has already acknowledged and accepted such extension by executing Supplementary PPA with the Respondent GUVNL pursuant to the above Order dated 07.12.2018, wherein the SCOD date is agreed to be 31.12.2019 and further accepting that the Petitioner shall commission the project by the said date and in an event the

Petitioner fails to achieve commissioning of the project till 31.12.2019, no further extension shall be allowed beyond 31.12.2019.

16.38. We note that there was no COVID-19 upto 31.12.2019 and it is an admitted fact that there was no COVID-19 pandemic in the country as well as in the State till the extended SCOD of 31.12.2019 but was post that date. The Order was passed by the Commission on 07.12.2018 extending the SCOD till 31.12.2019 and during such period there was no issue of COVID-19. Therefore, the claim of the Petitioner to have been affected by COVID-19 and claiming the same as a force majeure event is not valid and does not sustain is therefore for a period after 31.12.2019. Further, the Petitioner has relied on the Suo Motu Order dated 23.03.2020 passed by the Hon'ble Supreme Court extending limitation to file claims and litigations between 15.03.2020 and 28.02.2022.

16.39. We note that the Respondent GUVNL has relied on the decision of the Hon'ble Supreme Court in *Sagufa Ahmed and Others versus Upper Assam Plywood Products Pvt Ltd and Others* [(2021) 2 SCC 317], dealing with the Order of the Hon'ble Supreme Court suspending the running of period of limitation on account of COVID-19 had considered its impact on cases where the limitation had expired before 23.03.2020. Therefore, in terms of said judgment in case of *Sagufa Ahmed*, reliance placed by the Petitioner on Suo Motu Order dated 23.03.2020 passed by the Hon'ble Supreme Court does not appear to be correct because Suo Motu Order dated 23.03.2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 : 2020 SCC OnLine SC 343] of the Hon'ble Supreme Court is with regard to the 'period of limitation' and it is noted in *Sagufa Ahmed* by the Hon'ble Apex court that 'Cognizance for Extension of Limitation' was intended to benefit vigilant litigants who were prevented due to the pandemic and the lockdown, from initiating proceedings within the period of limitation prescribed by general or special law.

16.40. Further, the Hon'ble High Court of Delhi in *Halliburton Offshore Services Inc -versus Vedanta Limited and Ors* dated 29.05.2020 in OMP (I) (COMM) No. 88 of 2020, has held as that:

“.....

62. *The question as to whether COVID-19 would justify non-performance or breach of a contract has to be examined on the facts and circumstances of each case. Every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a Force Majeure condition. The Court would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non performance due to the epidemic/pandemic.*

63. *It is the settled position in law that a Force Majeure clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations. As observed in Energy Watchdog (supra) it is not in the domain of Courts to absolve parties from performing their part of the contract. It is also not the duty of Courts to provide a shelter for justifying non performance. There has to be a 'real reason' and a 'real justification' which the Court would consider in order to invoke a Force Majeure clause."*

16.41. Accordingly, the claim of the Petitioner that it was affected by force majeure to implement the project by 31.12.2019 or on account of force majeure of COVID 19 is not sustainable. Even, otherwise it is decided by us that the Petitioner is not entitled to any extension beyond 31.12.2019 in preceding paras and therefore, the question of considering COVID-19 which is a subsequent event does not arise. In addition to the above the Petitioner had duly accepted the Order dated 07.12.2018, entered into the Supplementary PPA and both of which clearly stipulate of the last opportunity to the Petitioner to establish the power project by 31.12.2019. The Supplementary PPA clearly stipulates that the Petitioner shall not ask for any further extension beyond 31.12.2019. Hence, the Petitioner cannot subsequently change its position and claim for further extension beyond 31.12.2019, initially for 24 months in original Petition and 24 plus 6 months in an IA filed later on. We are of the view that the Petitioner having once accepted a particular position cannot approbate and reprobate at a subsequent stage.

16.42. It is contended by the Respondent GUVNL, that the Petitioner has signed the Supplemental PPA with open eyes and is accordingly bound by the Supplemental PPA, wherein; it is stated that it shall not ask for any further extension and reliance is placed on judgment passed by the Hon'ble Supreme Court in *Gujarat Urja Vikas Nigam Limited versus Solar Semi-Conductor Power Co. (India) P. Ltd*, [(2017) 16 SCC 498], wherein it is held as under:

“38. Regulation 85 provides for extension of time. It may be seen that the same is available only in two specified situations — (i) for extension of time prescribed by the Regulations, and (ii) extension of time prescribed by the Commission in its order for doing any act. The control period is not something prescribed by the Commission under the Conduct of Business Regulations. The control period is also not an order by the Commission for doing any act. Commissioning of a project is the act to be performed in terms of the obligation under the PPA and that is between the producer and the purchaser viz. Respondent 1 and appellant. Hence, the Commission cannot extend the time stipulated under the PPA for doing any act contemplated under the agreement in exercise of its powers under Regulation 85. Therefore, there cannot be an extension of the control period under the inherent powers of the Commission.

39. The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act.”

16.43. We are of the view that the reliance placed by the Petitioner on decision of Hon'ble Supreme Court in suo-motu proceedings is misplaced because the present Petition was already filed by the Petitioner on 13.09.2019 and aforesaid Order of the Hon'ble Apex Court deals with filing of pleadings and not performance of contractual obligations. As already noted above said aspect has been dealt with by the Hon'ble Supreme Court in the case of *Sagufa Ahmed and Others versus Upper Assam Plywood Products Pvt Ltd and Others* [(2021) 2 SCC 317].

16.44. Thus, there is no reason to differ from the decision that the force majeure claim on

account of COVID-19 that has been subsequently claimed by the Petitioner cannot be allowed and therefore, no relief is granted on that count. Even, if any concession on ground of COVID-19 may be considered, it will not help the Petitioner when the Petitioner has hardly done any substantial work for commissioning of the project either before or after COVID-19.

16.45. We note that the Petitioner has also advanced other submissions with regard to the peculiar nature of the project stating that unlike a Solar PV Project, a Solar Thermal Project requires continuous land for viability of the plant because in a PV Project modules are laid down and essentially the said modules can also be laid on non-continuous land whereas in a Solar Thermal Plant the Parabolic Trough Technology requires that the said Trough is laid on a continuous land for the plant to operate. It is also stated that, the Central Electricity Authority in a Report of Sub-group II & III on "Integration of Solar Systems with Thermal/ Hydro Power Stations" dated January, 2010 has also stated that for a Solar Thermal Projects it is imperative that a continuous piece of land is used. The Solar Thermal Project which uses renewable solar resources to generate electricity produces very low levels of greenhouse-gas emissions and is one of the major renewable energy technologies that is under large scale commercial deployment which can produce 24 x 7 scale as per demand versus supply after using thermal storage being one biggest benefit specific to it which makes CSP stand out from other major RE technologies like solar photovoltaic (PV) and wind. It also works similar to any coal/gas fired power plant without any requirement of coal/gas and can go up to any capacity even it can attend super critical status $T > 2535\text{ C}$ at 224 Bar. A.

16.46. We are of the view that aforesaid aspects pointed out by the Petitioner pertain to technology specific characteristics of two different Solar based energy projects. Even, the Commission in its Order No. 2 of 2010 dated 29.01.2010 pertaining to tariff terms and conditions for purchase of power by the distribution licensees within the State from Solar based power projects has determined separate tariff for Solar PV based technology and Solar Thermal. We note that it has been specifically admitted by the Petitioner that grounds raised in previous Petitions are not raised in present matter and accordingly no plea is raised in respect of land. Hence, aforesaid submission regarding requirement of contiguous land for Solar Thermal project qua

Solar PV or report of CEA appears to be not relevant with regard to the reliefs sought in this matter. Similarly, reduction in greenhouse gases, generation similar to conventional projects, availability of super critical technology etc. is of no avail to the Petitioner in present matters. Hence, we decide that aforesaid aspects have no bearing with the reliefs sought in present matters and prima facie have no relevance with regard to matter under consideration. It is also submitted that as per Order dated 07.12.2018 passed by the Commission in Petition No. 1608 of 2016, the Petitioner has submitted monthly progress reports regarding the project, which is only a matter of record and does not merit any decision.

16.47. With regard to the submission of the Petitioner that substantial investment towards the project has been made and for timely commissioning of the Project various orders with various companies have been placed by the Petitioner including undertaking all developmental work possible on the land for which it has received the 89 A Permission and that a dispensary & water tank for Khanpur Village is constructed does not appear to be anything beyond the obligations of the Petitioner, whether contractual or otherwise and we are of the view that the same is of no avail to the Petitioner qua the reliefs sought. It appears that inconsistent representations have been made by the Petitioner from time to time. It is not clear as to why the Petitioner approached EPC contractors in China when it has been consistent stand of the Petitioner that critical & major equipment required for the project are already ordered / procured and received at project site and that all the long lead equipment including Heat Exchanger from Aalborg, Denmark has been shipped and laying at the project site, Steam Turbine Generator from GE- Italy is ready for shipment and detailed list of other plant & machinery, balance of plant etc. is placed on record. Even, it is noteworthy that in an affidavit dated 29.06.2015 submitted / filed by the Petitioner in an IA in Petition No. 1513 of 2015, it is stated that private land for the entire project has been acquired out of which 89 A approval for land has also been granted to the Applicant/Petitioner. Thus, reasons for not commissioning the project followed by achieving commercial operation are not clear when land was not an issue or equipment / machinery for project are ordered & procured.

16.48. We note that Article 4.3 of the PPA provides for levy of liquidated damages in case the Petitioner is not able to achieve commercial operation by the Scheduled

Commercial Operation Date as may be extended, which reads as under:

“4.3 Liquidated damages for delay in commissioning the Project/Solar Thermal Grid Interactive Power Plant beyond Scheduled Commercial Operation Date

If the project is not commissioned by its Scheduled Commercial Operation Date other than the reasons mentioned below, the Power Producer shall pay to the GUVNL liquidated damages for delay at the rate of Rs. 10000 per MW for delay of first 60 days and Rs. 15000 per day per MW thereafter. Liquidated damage is payable upto delay period of 1 year from Scheduled Commercial Operation Date. If the Power Producer fails to make payment of the liquidated damages for a period exceeding 30 days, GUVNL shall be entitled to invoke the Bank Guarantee to recover the liquidated damages amount. In case of delay more than 1 year GUVNL assumes no obligation and has right to terminate the Power Purchase Agreement by giving 1 month Termination Notice.

- 1. The project cannot be commissioned by Scheduled Commercial Operation Date because of Force Majeure event, or*
- 2. The Power Producer is prevented from performing its obligations because of material default on part of GUVNL.*
- 3. Power Producer is unable to achieve commercial operation on Scheduled Commercial Operation Date because of delay in transmission facilities / evacuation system for reasons solely attributable to the GETCO.*

.....”

As per above Article, liquidated damages (LD) are leviable for delay in commissioning of the project by the ‘Power Producer’ beyond SCOD upto delay period of 1 year from SCOD. However, LD is not applicable if such delay is due to (i) Force Majeure event or (ii) Power Producer is prevented from performing its obligations because of material default on part of the Respondent GUVNL or (iii) Delay in transmission / evacuation facilities solely attributable to GETCO. Moreover, if the Power Producer fails to make payment of the liquidated damages for a period exceeding 30 days and encashment of Bank Guarantee to recover the amount towards liquidated damages. Further, in case of delay of

more than 1 year, there is no obligation on GUVNL and has right to terminate the PPA by giving 1 month Termination Notice.

16.49. We note that in written submissions filed by the Respondent GUVNL, it is submitted by GUVNL that the Petitioner has also sought for cost escalation, at a belated stage stating that the tariff agreed under the PPA with the Petitioner is Rs. 11 per unit for first 12 years and Rs. 4 per unit for next thirteen years thereafter. It is also submitted by GUVNL that as on date, tariff for Solar power is less and Renewable Purchase Obligation is met by the Respondent GUVNL with the purchase of such RE power at considerably less price, which is in the interest of general body of consumers. Therefore, GUVNL has contended that there is no justification in public interest or in the interest of general body of consumers for the Respondent GUVNL to continue with the PPA with the Petitioner.

16.50. We note that as per Section 86(1)(b) of the Electricity Act, 2003, the State Commission is mandated to regulate the power purchase and procurement process of the distribution licensees, which includes the price and the agreements for purchase of power for distribution and supply of electricity within the State.

16.51. The PPA was executed between the parties on 30.04.2010 pursuant to allocation of the Solar Thermal Power Project in the State of Gujarat which is a renewable energy source and under the said PPA, the Petitioner was to generate electricity and supply to the Respondent, GUVNL. The tariff agreed under the said PPA was in terms of the Order dated 29.01.2010 passed by the Commission in Order No. 2 of 2010 regarding 'Determination of tariff for Procurement of Power by the Distribution Licensees and others from Solar Energy projects'. The tariff determined the Order as under:

"5. Tariff for solar PV and Solar Thermal Power projects:

In view of the foregoing discussions, the various parameters considered by the Commission for determination of tariff are given in the table below:

	<i>Parameter (per MW basis)</i>	<i>Solar PV Power Project</i>	<i>Solar Thermal Power Project</i>
	<i>Project Cost</i>		

1	Capital cost per MW (Rs lakhs)	1650	1300
2	Debt- Equity ratio	70:30	70:30
3	Interest on loan	10.75%	10.75%
4	Return on Equity	14% p.a.	14% p.a.
5	Income-Tax for first 10 years	16.995%	16.995%
6	Income tax from 11th year onwards	33.99%	33.99%
7	O&M cost (% of the project cost)	0.5% of the capital cost (Rs. 8.25 lakhs) for the first year with escalation of 5% p.a.	1% of the capital cost (Rs. 13 lakhs) for the first year with escalation of 5% p.a.
8	Insurance Charges	0.35% of net asset	0.35% of net asset
9	Net CUF (at 100% grid & m/c availability)	20%	20%
10	Auxiliary consumption	NIL	10%
11	Actual machine availability	100%	100%
12	Actual grid availability	100%	100%
13	Project life (years)	25	25
14	Depreciation	6% for first 10 yrs. And 2% from 11th year onwards.	6% for first 10 yrs. And 2% from 11th year onwards.
15	Interest on working capital (i) Receivable of one month (ii) O&M expenses for one month	11.75%	11.75%

Based on the various parameters as discussed above, the levelised tariff including RoE of Solar PV power generation, using a discounting rate of 10.19% works out to Rs. 12.54 per kWh and levelised tariff using the same discounting factor for Solar Thermal Power generation works out to Rs.9.29 per kWh. However, the Commission feels that it would be appropriate to determine tariff for two sub-periods: 12 years and 13 years instead of the same tariff for 25 years. Hence, the Commission determines the tariff for generation of electricity from Solar PV Power project at Rs.15 per kWh for the initial 12 (twelve) years starting from the date of Commercial operation of the project and Rs.5 per kWh from the 13th (Thirteenth) year to 25th (twenty fifth) year. The Commission also determines the tariff for generation of electricity from Solar Thermal Power project at Rs.11 per kWh for the initial 12 (twelve) years starting from the date of Commercial operation of the project and Rs.4.00 per kWh from the 13th (Thirteenth) year to 25th (twenty fifth) year.

The above tariffs take into account the benefit of accelerated depreciation under the Income Tax Act and Rules. For a project that does not get such benefit, the Commission would, on a petition in that respect, determine a separate tariff taking into account all the relevant facts.

This tariff rate shall be applicable for purchase of solar power generation by Distribution Licensees and other entities for complying with the renewable power purchase obligation specified in the relevant Regulations of the Commission from time to time. This tariff will be applicable to solar power generators, who will commission brand new solar energy plants and equipments during the control period applicable for this order.”

In above Order, the control period decided by the Commission was two years and accordingly, the above tariff was applicable to such projects which are commissioned on or up to 28.01.2012 and thereafter, the tariff for the next control period was determined by the Commission vide Order No. 1 of 2012 dated 27.01.2012.

16.52. The PPA dated 30.04.2010 sets out the terms and conditions for generation and sale of the electricity from the project with the tariff provision in Article 5 of the PPA which reads as under:

“ARTICLE 5

RATES AND CHARGES

5.1 Monthly Energy Charges: GUVL shall pay to the Power Producer every month for Scheduled Energy / Energy injected as certified in the monthly SEA by SLDC the amounts (the "Tariff) set forth in Article 5.2 herein.

5.2 GUVNL shall pay the fixed tariff mentioned hereunder for the period of 25 years for all the Scheduled Energy / Energy injected as certified in the monthly SEA by SLDC. The tariff is determined by Hon'ble Commission vide Tariff Order for Solar based power project dated 30.1.2010.

Tariff for Thermal Project:

Rs.11 / KWh for First 12 years and thereafter

Rs. 4 / KWh from 13th Year to 25th year.

Above tariff shall apply for solar projects commissioned on or before 31st December 2011. In case, commissioning of Solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by Hon'ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, which ever is lower.”

16.53. Despite above and having signed the PPA on 30.04.2010, the Petitioner has not been able to commission the Solar Thermal Power Project and that too despite several extensions granted in the past as noted above. As already discussed above, we are of the view that the Petitioner has not been able to satisfactorily prove that 'Force Majeure' events prevented the Petitioner from achieving SCOD on or before 31.12.2019 or to satisfy that further extension needs to be granted on basis of grounds advanced by the Petitioner. Even, otherwise, it does not appear to be a fit case for allowing the reliefs sought in the main Petition. Hence, we decide that the reliefs prayed for by the Petitioner in main Petition is not allowed and therefore, relief sought in IA No. 14 of 2019 of restraining the Respondent GUVNL from

invoking the Bank Guarantee cannot be allowed. Also, having decided not to grant any further extension to the Petitioner for extension of construction default and Scheduled Commercial Operation Date, the reliefs sought in IA No. 3 of 2021 cannot be allowed because COVID-19 was an event subsequent to 31.12.2019 i.e. the date until which the extension was allowed to the Petitioner for commissioning the project. Admittedly, COVID-19 event was post March 2020 and therefore, cannot be an event which can be said to have affected or delayed the Petitioner from implementing the Project by the extended scheduled commercial operation date that was allowed by the Commission till 31.12.2019 in its Order dated 07.12.2018 in Petition No. 1608 of 2016. Moreover, having decided that no extension is granted to the Petitioner beyond 31.12.2019, the reliefs prayed in IA No. 3 of 2021 are not allowed and thereby rejected.

16.54. We are also aware of the fact that if further extension is allowed to the Petitioner, the Respondent GUVNL will have to eventually pay aforesaid tariff in accordance to the provisions of the PPA towards energy that may be generated and supplied by the Petitioner and such tariff amount is part of the Aggregate Revenue Requirements & Tariff Determination of the Respondent GUVNL / distribution licensees of the Respondent herein because tariff payments made is reflected in their books of accounts as power procurement cost and ultimately in Tariff Petition(s) before this Commission for supply of electricity to consumers at large. Moreover, the Commission while determining the generic tariff in above referred Order No. 2 of 2010 dated 29.01.2010 had observed that the capital cost of the Solar project might reduce drastically as time elapses. Accordingly, the feed-in-tariff determined by the Commission in Order No. 1 of 2012 dated 27.01.2012 for Solar Thermal Power Projects availing accelerated depreciation was determined as Rs. 11.55 per kWh, while the tariff for similar projects not availing accelerated depreciation to be Rs. 12.91 per kWh which was thereafter respectively determined as Rs. 10.11 per unit and Rs. 11.22 per unit in Order No. 3 of 2015 dated 17.08.2015. Even, thereafter, the Commission had issued Orders determining the feed-in-tariff but then the Commission in its letter dated 18.03.2017 observed that as per provisions of National Tariff Policy, procurement from Renewable Energy Projects by the Distribution Licensees is recommended through Competitive Bidding to keep the tariff low and that the Government of India and various other State Governments

initiated Competitive Bidding Process in which the discovered tariff has shown substantial reduction and accordingly, through the said letter it has been directed that the Distribution Licensees to procure electricity from the Wind/Solar Power Projects through Competitive Bidding Process under Section 63 of the Electricity Act, 2003 or by following the Competitive Bidding Process followed by SECI/MNRE.

16.55. Moreover, apart from the discussion hereinabove leading to the decision of not allowing any further extension to the Petitioner in present matter, we are of the view that keeping in view the interest of general body of consumers, there is no justification in public interest or in the interest of general body of consumers to allow the reliefs sought by the Petitioner in the main Petition as well as the IAs filed therein. Accordingly, we decide that the Petitioner / Applicant is not granted the reliefs as prayed for.

16.56. We note that in the aforesaid IA No. 03 of 2021 filed on 25.01.2021, the Applicant / Petitioner has sought amendment of original Petition stating the following:

- (a). That the original Petition was listed before the Commission on 12.06.2020 whereby this Commission was pleased to direct filing of additional submissions with regard to the queries raised by the Commission during the course of hearing,
- (b). Pursuant of the Order dated 22.06.2020, the Petitioner has filed additional submissions on 09.07.2020 in the present Petition,
- (c). In light of aforesaid additional facts and submissions, it is imperative that prayers in main Petition are amended and hence, the Petitioner has filed the aforesaid Application seeking amendment of Petition No. 1822 of 2019.

16.57. Apart from above submissions, the Applicant / Petitioner has not chosen to put forth any other grounds or reasons for allowing the Amendment. Per contra, the Respondent GUVNL has objected to aforesaid amendment sought by the Petitioner praying to allow replacing the prayer clauses (i) to (vi) of original Petition. Since, the contentions / objections / submissions of the Respondent GUVNL are already referred in previous paras of this Order, the same are not repeated for sake of brevity. However, broadly it has been objected on the grounds that (i) Application seeks to change the scope of the original Petition, (ii) belatedly preferred as an

afterthought, (iii) extension of 30 months is now sought instead of 24 months in main Petition (iv) Earlier, the Commission having already considered inordinate delay in achieving COD granted extensions on several occasions, (v) In Order dated 07.12.2018 in the Petition No. 1608 of 2016 that as a last opportunity the SCOD was extended upto 31.12.2019 which attained finality, (vi) Applicant has executed the Supplementary PPA with the Respondent GUVNL which is binding wherein the SCOD is agreed as 31.12.2019, (vii) cannot approbate and reprobate (viii) COVID period was post 31.12.2019 and amendment is filed in January 2021, (ix) No new reasons for seeking amendments is provided, (x) amendment has to be considered in the light of the principles of Order VI Rule 16 of Code of Civil Procedure, 1908, (xi) lacks bona-fide and hence it is not permissible to allow said amendment application by the Commission

16.58. Thus, through the aforesaid IA No. 03 of 2021, the Applicant / Petitioner seeks to amend the original prayer clauses by insert new prayer clauses having different timeline of extension sought in originally filed Petition. *Prima facie* it also appears that the Applicant/Petitioner has not submitted any cogent reasons/grounds in support of seeking the said amendment in prayer clauses.

16.59. In catena of decisions, it has been held that court has discretionary power to allow or disallow any amendment application and the discretion should be exercised judiciously and such judicial discretion should be exercised judicially for the purpose of complete justice and to prevent further litigation. The main object of the rule for amendment is that the courts should get at and try merits of the case and should consequently allow all amendments that may be necessary for determining the real question in controversy between the parties without causing injustice to other side. An amendment which does not constitute addition of new cause of action or raise a different issue but amounts merely to a different or additional approach to the same facts can be allowed. However, by allowing amendment, a party should not be allowed to set up a new case or new cause of action and to completely change the case made out in the original pleadings and has to be liberally construed so long a party does not alter the basic cause of action and takes the other party by surprise and prejudice Moreover, any amendment should be before commencement of trial of the case. Here, in the present case before this Commission, pleadings were more

or less completed in the main Petition before the filing of the amendment application. Even, oral arguments were also made before previous bench of this Commission during the hearings on 12.06.2020 & 28.01.2021 (IA No. 03 of 2021 was not listed pending registration) by the Ld. counsels for the Petitioner as well as the Respondents, which is evident from the Daily Orders passed. Undeniably, the Petitioner has preferred an amendment application subsequently vide affidavit dated 25.01.2021.

16.60. It can also be culled out from various judgments as well as the settled Principle of law that liberal construction of law does not mean that as a matter of course each and every application should be allowed. When the amendment enlarges the scope of the matter and scope of defense is narrowed or right accrued in favour of defendant is destroyed or when it is at a very belated stage tending to cause prejudice or injustice to the defendants, the court should reject such application.

16.61. It needs to be also noted that the amendment sought by the Petitioner is completely contrary to the Supplemental PPA specifically entered by the Petitioner with the Respondent GUVNL on basis of an Order dated 07.12.2018 passed by the Commission in Petition No. 1608 of 2016 after hearing the parties wherein the SCOD is agreed by the Petitioner as 31.12.2019. Moreover, the said Order has since attained finality as no appeal was preferred against the same by any of the parties. We therefore decide to restrict ourselves to the disputes raised in the present Petition by the Petitioner and contested by the Respondent, i.e., the period after 31.12.2019 for which extension is sought by the Petitioner.

16.62. Since, ultimately whether the amendment sought is required to be allowed or not would depend upon the facts and circumstances of the matter. Moreover, in the matter before us the dispute between the parties is regarding whether allowing any further extension to the Petitioner in Construction Default, SCOD, levy of liquidated damages etc. In the original Petition an extension is sought by the Petitioner from 31.12.2019 to 31.12.2021 and thereafter, in aforesaid IA No. 03 of 2021, the Applicant / Petitioner is seeking amendment in prayer clause seeking extension of 24 months plus 6 months on account of COVID-19. The Respondent GUVNL has strongly objected to grant of any further extension to the Petitioner / Applicant as

well as non-levy of liquidated damages otherwise applicable as per the provisions of the PPA alongwith other prayers of the Petitioner / Applicant. Therefore, the moot issue before us in the first place is whether any extension to be granted to the Petitioner and hypothetically assuming that extension can be granted to the Petitioner then only the issue of period of extension arises. Therefore, the reliefs sought in IA No. 3 of 2021 wherein the time period for which extension is sought is different & distinct to time period for which relief is sought in main Petitioner. Accordingly, IA No. 3 of 2021 is primarily dependent on the decision of this Commission as to whether this Commission contemplates granting any extension to the Petitioner because it is only after the said aspect is decided that the period for which extension may be granted would arise. Admittedly, impact of COVID-19 pandemic, if any, to be considered is relevant after 24.03.2020 whereas the last extension that was allowed by this Commission vide Order dated 07.12.2018 passed by the Commission in Petition No. 1608 of 2016 is only up to 31.12.2019.

16.63. Considering above and in absence of any valid reasons for seeking amendment, we also decide that IA No. 03 of 2021 in main Petition is not allowed.

16.64. While dealing with these matters it has emerged that the Petitioner has projected that the Solar Thermal Plant to be developed by the Petitioner pursuant to signing of PPA in the year 2010 is one of its only kind within the State of Gujarat as well as within the country. It is also submitted that with the proposed storage technology the said Solar project can supply and the Respondent GUVNL can avail the benefit in terms of reliable, stable and round the clock green source of power even during peak hours. However, this case appears to provide another instance, a glaring one, on the basis of the facts indicated therein and the reasons advanced by the Petitioner in absence of any noticeable progress of construction, erection etc. actually at the project site seeking indulgence of this Commission in exercise its jurisdiction for seeking further extension in timelines despite having availed four extensions in the past qua Construction default & SCOD and consequentially non-levy of liquidated damages from this Commission (a) Initially, from originally agreed SCOD of 31.12.2011 (i.e. 20 months from date of signing PPA on 30.04.2010) to 31.07.2013 vide Order dated 07.04.2012 in Petition No. 1125 of 2011; (b) Thereafter, upto 31.12.2015 vide Order dated 05.05.2015 in Petition No. 1333 of 2013; (c) Further

up to 30.06.2017 vide Order dated 31.07.2015 in Petition No 1513 of 2015; and (d) Lastly up to 31.12.2019 vide Order dated 07.12.2018 in the Petition No. 1608 of 2016, the Petitioner has not produced cogent reasons to satisfy granting any further extension. *Prima facie* it appears to be merely a consequence on account of non-accomplishment of what the Petitioner was otherwise obliged to have done during all these years towards development of the Solar project and presumably seems to be an afterthought. Moreover, while adjudicating the dispute in the present matters and prior to granting the reliefs sought by the Petitioner/Applicant, it is equally important for this Commission apart from the history of the matter on hand to protect the interest of the consumers at large consequentially arising through the Respondent GUVNL more particularly with consideration of above noted extensions in past and contentions raised by the Respondent GUVNL in opposing the reliefs sought. Eventually, if all these is not taken into consideration, it may not be appropriate on part of the Commission. Although, the ambit of this case may seemingly appear to be small and of a routine matter involving grievances of the parties, both factually and legally but above rival submissions/contentions by the parties reveal the gravity of the matter. Be that as it may be but any further intervention by this Commission in granting any further extension will be contrary to a just and fair decision because the Petitioner has not only failed in adequately justifying on basis of submissions made for allowing further extension, but no material has been produced in support thereof in the present case. Hence, we are of the view that if the extensions are further allowed to persist then it may lead to serious consequences not only to the Respondent GUVNL but also to the ultimate consumers at large because eventually the cost towards power procurement, if any, with the PPA tariff is reflected in Tariff Petitions and becomes part of the tariff determination process of the licensees.

17. Here in these matters, from the facts, circumstances and other material on record, it is very clear that the Petitioner has failed to make out even an arguable case. We note that after last extension granted by this Commission vide Order dated 07.12.2018 in Petition No. 1608 of 2016 to the Petitioner for achieving SCOD by 31.12.2019, the Petitioner has not advanced any grounds or made any convincing submissions that support the reliefs sought in these matters regarding further extension of Construction Default, SCoD, non-levy of liquidated damages etc. On the

contrary even after extensions granted for long period of 12 years, there is no substantial progress made by the Petitioner for commissioning of the Solar Thermal Plant. Even, it cannot be said that the Solar project of the Petitioner would start operating within 10 months or in near future. Further, it cannot be ignored that after lapse of 12 years of time from signing of the original PPA, the Respondent has not got any electricity generated from the project of the Petitioner and now considering the higher tariff in the PPA qua the tariff at which Solar power is presently available, with continuous failure and lack of *bonafide* on the part of the Petitioner, leaves this Commission with no option but to dismiss these matters without granting any reliefs as prayed for therein.

18. In view of above discussion and having carefully examined all the relevant issues involved in these matters and dispute between the parties arising for consideration and decision by us, we decide that the reliefs / prayers sought by the Petitioner in the main Petition read with the amendment sought in prayer clauses of main Petition through IA No. 03 of 2021 are not allowed and consequentially the prayer in IA No. 14 of 2019 regarding restraining the Respondent from invoking/encashing the Performance Bank Guarantee is also not allowed since the said invocation by the Respondent GUVNL has been decided in earlier paras of this Order to be subject to final decision of the Commission in main matter. Since the Commission has decided not allowed the prayers of the Petitioner in the main Petition regarding extension of Construction Default and Scheduled Commercial Operation Date, the prayers in IA No. 14 of 2019 are also not allowed. Accordingly, the decision of the Commission in its Daily Order dated 07.01.2020 directing the Respondent to restrain from invoking/encashing the Bank Guarantee of the Petitioner is now vacated. Accordingly, the Respondent GUVNL is now at liberty to act further in accordance with law. Similarly, the prayers in IA No. 03 of 2021 are also not allowed. Accordingly, we hold and decide that the reliefs / prayers sought in the main Petition as well as the IAs filed therein are not granted and accordingly, the same are rejected. Moreover, the Respondent GUVNL is at liberty to take further recourse as per provisions of the PPA in accordance with law.
19. Consequentially, in terms of above, the prayers are rejected and the main Petition is dismissed and IA No. 14 of 2019 & IA No. 03 of 2021 are accordingly disposed.

20. Before parting it is noted that during the pendency of these matters, Jan Kalyan Foundation sought impleadment but thereafter, nobody has remained present despite notice. Accordingly, the same also stands disposed.

21. Order accordingly.

Sd/-
[Mehul M. Gandhi]
Member

Sd/-
[Anil Mukim]
Chairman

Place: Gandhinagar.

Date: 03/01/2023.

