

**BEFORE THE GUJARAT ELECTRICITY REGULATORY
COMMISSION, GANDHINAGAR**

Petition No. 1948 of 2021

In the Matter of:

Petition under Section 86 (1) (e) & (f) of the Electricity Act, 2003 for quashing of Order and setting aside the specific unilateral conditions pertaining to installation of Solar PV Modules and 'Base CUF' imposed by the Respondent/GUVNL vide its communication dated 10.12.2020, which is in the contravention of the provisions of the PPA dated 09.12.2010 and also seeking extension of first part of the total duration of the PPA for 12 years under Article 5.2 of the PPA, till the requisite replacement of Solar PV Modules is completed.

Petitioner : Jai Hind Projects Limited

Represented by : Ld. Advocate Mr. Amit Kapoor with Ld. Advocates
Mr. Ashish Jha and Mr. Tabish Samdani

V/s.

Respondent No. 1 : Gujarat Urja Vikas Nigam Limited

Represented by : Ld. Advocates Ms. Shrishti Khindaria and Ms.
Harini Subramani alongwith Mr. Sanjay Mathur
and Mr. Kishore Lakhani

CORAM:

Mehul M. Gandhi, Member

S. R. Pandey, Member

Date: 17/07/2023

ORDER

1. The present Petition has been filed by the Petitioner under Section 86 (1) (e) & (f) of the Electricity Act, 2003 for quashing of Order and setting aside the specific unilateral conditions pertaining to installation of Solar PV Modules and 'Base CUF' imposed by the Respondent/GUVNL vide its communication dated 10.12.2020, which is in the contravention of the provisions of the PPA dated 09.12.2010, and also seeking extension of first part of the total duration of the PPA for 12 years under Article 5.2 of the PPA, till the requisite replacement of Solar PV Modules is completed.

2. **PRAYERS IN THE PETITION:**

- (a) *Pass an Order quashing/setting aside the specific unilateral conditions pertaining to installation of solar PV Modules and 'Base CUF' imposed by the Respondent vide its communication dated 10.12.2020, which is in contravention of the provision of PPA dated 09.12.2010.*
- (b) *Pass an Order extending the first-time block of 12 years contained in Article 5.2 of the PPA till the date the modules are replaced, and the plant is fully operational with 5 MW capacity, appropriately for the delay caused by the Respondent.*
- (c) *Pending final disposal of the Petition, pass an interim Order permitting the Petitioner to install 9,510 Solar PV Modules and carry out other necessary repair works in the Solar Power Plant so as to enable the Petitioner to operate the Solar Power Plant at installed capacity of 5 MW in terms of the PPA between the parties.*

(d) Pass such other further order or orders as this Hon'ble Commission may deem fit and proper under the facts and circumstances of the present case and in the interest of justice."

3. BRIEF FACTS OF THE PETITION:

- 3.1. The Petitioner- Jaihind Projects Limited ('JPL') is a company registered under the Companies Act, 1956. The Petitioner is a generating company within the meaning of Section 2 (28) of the Electricity Act, 2003.
- 3.2. The Respondent is a distribution licensee within the meaning of Section 2(17) of the Electricity Act, 2003 having its office at the address mentioned above.
- 3.3. The Petitioner has set up 5 MW Solar PV Power Project at Village- Chadiyana, Town- Santalpur, District- Patan in the State of Gujarat. The Petitioner entered into a Power Purchase Agreement ('PPA') dated 09.12.2010 with the Respondent for sale of entire electrical energy so produced from the Solar Power Plant to the Respondent for a period of 25 years.
- 3.4. Article 4.1 of the PPA states about obligations of the Power producer. That the Solar Power Plant was commissioned and ready for commercial operation on 18.04.2012 as per the certificate of commissioning dated 09.05.2012 issued by Gujarat Energy Development Authority ('GEDA').
- 3.5. The Petitioner commenced power supply from the Solar Power Plant to the Respondent in April, 2012 in terms of the PPA dated 09.12.2010.
- 3.6. It is submitted that in the year 2018, Petition No. CP(IB) No.172 of 2018 under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IBC')

was filed against the Petitioner for initiation of Corporate Insolvency Resolution Process ('CIRP') before the Hon'ble National Company Law Tribunal, Ahmedabad Bench ('NCLT'). The NCLT admitted the aforementioned Petition vide its Order dated 02.11.2018 and consequently CIRP in respect of the Petitioner commenced. By the said Order, the NCLT also appointed Resolution Professional in respect of the Petitioner Company.

- 3.7. That on 20.04.2019 the Resolution Professional in the above proceeding prepared and issued the Information Memorandum containing all the relevant & vital information related to the Petitioner Company, to the prospective Resolution Applicants.
- 3.8. It is submitted that based on the above, the present management of the Petitioner Company submitted its Resolution Plan (Bid) through a company namely Parixit Irrigation Limited. The Resolution Plan (Bid) of the present management of the Petitioner Company was approved by the Committee of Creditors with 72.03% votes.
- 3.9. It is submitted that upon approval of Resolution Plan by the Committee of Creditors, the same was also approved by the NCLT, under Section 31 of the IBC, vide Order dated 19.03.2020. Thus, in the above manner, the Petitioner Company was revived by the current management under the provisions of the IBC.
- 3.10. It is submitted that the PPA dated 09.10.2012 continues to be in operation, with power being supplied by the Petitioner to the Respondent. One of the primary obligations of the Petitioner under the PPA is to maintain and operate the Solar Power Plant and the corresponding obligation of the Respondent is to allow the Petitioner to operate the Plant as a base load generating station. It is imperative that

the Solar Power Plant of the Petitioner is maintained and is operated at its installed capacity i.e. 5MW.

3.11. It is submitted that the above said project plant was severally damaged during the year 2016 & 2017; due to heavy cyclone and floods in that region.

3.12. It is submitted that that the Information Memorandum dated 20.04.2019 issued under the provisions of the IBC in respect to the Petitioner Company records as under:

“Out of 58539 Panels, 49029 panels are in running conditions, 4690 have cracks/ damage and balance 4820 panels were scraped”

Thus, a total of 9510 Solar Panels in the Plant are damaged/ scraped and the same need repairing and/or replacement, in order to have the stipulated installed capacity of 5 MW as per the PPA.

3.13. It is submitted that the Petitioner received a communication dated 28.03.2019 from the Respondent wherein the Respondent informed that some of the Solar Power Projects with whom the Respondent has Power Purchase Agreements, had enhanced capacity of their Plants or were planning to enhance capacity of their Plants to get higher CUF after achieving the COD of their Projects, without the knowledge of the Respondent. The Respondent stated in the said communication that in case any irregularity is found in terms of capacity enhancement mechanism or enhancement of CUF or change in panels after the COD, the said communication shall be considered as a notice for termination of the PPA and hence the PPA shall be terminated without further notice.

- 3.14. It is submitted that the Ministry of New and Renewable Energy vide its letter dated 05.11.2019, informed to the solar developers, clarifying the issue of CUF, and upheld that the varying CUF does not breach any PPA, unless agreed upon such a condition.
- 3.15. It is submitted that the Deed of Confirmation for handing over physical possession by the Resolution Professional on 25.05.2020; wherein it is mentioned that plant is running at about 80% capacity. 4690 panels have cracked/damaged and 4820 panels scraped out of 58539 panels. Thus 49020 panels of 85 Wp are in running condition:-

“WHEREAS both the party of the First Part Parties noticed that Solar Power Plant has been made from the “Thin Film Solar Cell”, with 58539 nos. panels of 85KW capacity had installed to generate the 5MW with 5 Nos. of 1MW inverters with Solar irradiance as 5930Wh / m² / day average. It was further noticed that Out of 58539 Panels, 49029 Panels are in running conditions, 4690 Panels have cracks / Damage and balance 4820 Panels were scraped. The Plant is running at around 80% capacity of their installed capacity, i.e. less than 4.1 MW out of 5 MW.”

- 3.16. It is submitted that in view of the provisions contained in the PPA and the information provided in the Information Memorandum as also the communication dated 28.03.2019 addressed by the Respondent, the Petitioner addressed a letter dated 29.05.2020 to the Respondent with regard to the repair and refurbishment of the damaged portion of the Solar Power Plant in order to have the stipulated installed capacity of 5 MW as per the PPA. In the said letter, the Petitioner stated that the Information Memorandum provides that 1.3 MW of the plant is damaged and the same requires repair. Thus, in view of the above, the Petitioner, in order to have the stipulated installed capacity of 5 MW in the PPA proposed replacement of modules as also the invertors, which could not be repaired as the same were neither available for support nor

for service, on account of being obsolete. The Petitioner sought consent of the Respondent to proceed further.

3.17. It is submitted that in continuation of the above, the Petitioner addressed another letter dated 21.09.2020 to the Respondent wherein the Petitioner reiterated that the Solar Power Plant was not achieving its full capacity as a lot of Solar PV modules and some of the invertors were non-functional/damaged. The Petitioner also apprised the Respondent that it had engaged a third party agency M/s Chemtrols Solar Pvt. Ltd., for inspection of the Modules and that the report submitted by M/s Chemtrols Solar Pvt Ltd. Mumbai along with the photographs depicted the actual site condition, with around 1.2 MW of the Plant being damaged and requiring repair/ replacement. The report submitted by M/s Chemtrols Solar Pvt Ltd. also shows that a total of 9510 modules need to be repaired/ replaced.

3.18. The Petitioner further confirmed that it had no intention of enhancing the capacity of the Solar Power Plant and is undertaking the repairs/ replacement solely to achieve the full capacity of the Solar Power Plant and comply with its obligations under the PPA. The Petitioner apprised the Respondent that the aforementioned damage is causing recurring losses to the Petitioner.

3.19. The Petitioner sent an e-mail dated 9.10.2020 and letter dated 27.10.2020 to the Respondent requesting it to convey a date as per its convenience for the inspection of the Plant, so that the repair of the damaged portion can be done on immediate basis.

3.20. The Petitioner further stated that in case the visit to the Plant is not possible due to COVID situation, the Petitioner may be permitted to the repair the damaged portion and the inspection may be made as and

when convenient to the Respondent. Pursuant to the above, the Respondent's officials conducted the Plant visit on 04.11.2020.

3.21. The Respondent addressed a letter dated 10.12.2020 whereby it informed the Petitioner that the Petitioner is permitted to replace only 645 of the damaged modules, in such a way that the capacity of the replaced new modules does not exceed 54.83 KW. By the said letter, the Respondent sought to impose certain conditions, subject to which such permission was given. The Respondent, inter alia, stated that upon replacement of damaged panels, the total installed capacity of the Solar Power Plant shall not exceed the contracted capacity.

3.22. The Petitioner replied to the aforementioned letter vide its letter dated 10.12.2020. The Petitioner reiterated that 9510 number of modules are damaged which has led to enormous loss of total generated capacity. The Petitioner clarified that during the site inspection, the team of the Respondent was shown Segment No. 1 where there were no modules and only empty structures were seen without modules. The Petitioner further clarified that since the modules are made of Tappan Glass its module scrap heap was lying in one side. Further, in the course of inspection, 95 damaged modules in Segment No. 2 were missed. Thus, only 645 modules in Segment No. 3, 4 and 5 were reported and the survey for damaged modules in Segment No. 1 and 2 was not reported. The Petitioner reiterated that in order to achieve 5 MW of power generation, the Petition shall be required to install/ replace 9510 modules with capacity of 808KW in addition to 645 modules of 54.83 KW and 95 Modules in Segment No. 2, totalling to 10250 modules of 871 KW. The Petitioner further made it clear that the total plant capacity shall not exceed 5MW with the aforementioned installation and that the installation shall be in compliance of the PPA between the parties.

- 3.23. The Petitioner has already purchased the requisite Solar Modules which are to be replaced at the Plant. The said modules were delivered on site and are lying at the project site. The Solar Modules are prone to degradation and it is therefore imperative that the Petitioner be permitted to install the requisite modules so as to maintain the installed capacity of 5 MW.
- 3.24. It is submitted that the Respondent has not responded to the above referred communication of the Petitioner. In view of the stand taken by the Respondent in its letter dated 10.12.2020, it is evident that there is a dispute between the parties, which needs to be adjudicated by the Commission and therefore the Petitioner is approached the Commission by filing the present Petition.
- 3.24.1. The condition pertaining to the 'Base CUF' sought to be imposed by the Respondent vide its letter dated 10.12.2020 amounts to unilaterally incorporating a new condition contrary to the terms of the PPA and amounts to re-writing the PPA and as such is legally inoperable and arbitrary and therefore deserves to be quashed by the Commission.
- 3.24.2. The condition sought to be imposed by the Respondent of taking its prior permission to replace/repair Solar PV Panels is also unilateral and arbitrary and is contrary to the terms of the PPA. The action of the Respondent of imposing new conditions in a unilateral manner and precluding the Petitioner from replacing the requisite modules and repairing the Plant, as brought out above, are contrary to the terms of the PPA pertaining to operation and maintenance of the Solar Power Plant of 5 MW by the Petitioner.
- 3.24.3. Admittedly as per the provisions of the PPA the Petitioner is entitled to supply 5 MW of power from its Solar Power Plant to the Respondent. In

order to supply 5 MW of power to the Respondent, it is imperative that the Petitioner's Solar Power Plant of 5 MW installed capacity is fully operational and functional and that the damaged solar power modules, which are 9510 in number, are replaced and made operational forthwith. The act of the Respondent of precluding the Petitioner from installing the said modules amounts is contrary to the provisions of the PPA and therefore appropriate Orders are required to be issued by the Commission, to enable the Respondent to install the requisite modules in replacement of the damaged ones.

3.24.4. The CUF of the Solar Power Plant is dependent on various factors including the weather, parts of the Plant other than modules, etc., and thus the same is not in absolute control of the Petitioner. In such view of the matter as well, the condition being imposed by the Respondent is bad in law.

3.24.5. The Respondent is fully aware that 645 number modules, which according to the Respondent are required to be replaced, are not sufficient to achieve the installed capacity of 5 MW as per the PPA. The letter dated 10.12.2020 of the Respondent negates the requirement of having 5 MW installed capacity as per the PPA. It is evident that replacement of 645 Modules cannot reinstate the damaged part of the plant of around 1.3 MW capacity. Therefore, the decision of the Respondent to permit replacement of 645 MW modules is not supported by any reason or research and thus deserves to be set aside.

3.24.6. The Petitioner has already incurred an amount of Rs 2.5 Crore in procurement of the modules for replacing the damaged ones, which are lying at the project and are prone to degradation. The Petitioner has been always ready and willing to replace the damaged modules and has made all arrangements for the same in view of its obligations under the

PPA. However, the action of the Respondent of not permitting the Petitioner to undertake replacement/ repairing works of the modules, is in contravention of the PPA and therefore, merits setting aside by the Commission.

3.24.7. The Information Memorandum dated 20.04.2019 as also the detailed report prepared pursuant to inspection conducted by M/s Chemtrols Solar Pvt Ltd dated 24.09.2019 and 25.09.2019 clearly show that a total number of 9510 Solar PV Panels are required to be replaced, in order to enable the Plant to operate at its installed capacity of 5 MW. The Petitioner has sufficiently shown the need for replacing 9510 Solar PV Modules and has further undertaken that the aforementioned replacement shall not increase the installed capacity beyond 5 MW. However, the Respondent without any basis or rationale has only allowed replacement of 645 modules.

3.24.8. The Petitioner's request made in September 2020 was responded to by the Respondent only in the month of December, 2020, thereby delaying the entire process of replacement of Solar modules. The delay being caused is not only resulting in continuous losses to the Petitioner but is also leading to loss of resources of renewable energy.

3.24.9. The action of the Respondent has led to a recurring loss to the Petitioner, in as much as it has not been able to supply full 5MW power from the Solar Power Plant to the Respondent, which it is entitled to under the PPA. The Petitioner is incurring loss to the tune of 1.3 MW capacity, which the Petitioner is not able to supply due to damaged Solar PV Panels.

3.24.10. On account of delay in replacement of the requisite modules, which the Respondent is not allowing, the Petitioner has also been deprived of the

tariff for the shortfall in generation of power (1.2 MW approx.) that it is entitled to for the first 12 years under the PPA in terms of Article 5.2 of the PPA. Accordingly, the Petitioner is also seeking extension of the first-time block of 12 years till the date the modules are replaced, and the Plant is fully operational with 5 MW capacity.

3.24.11. The actions of the Respondent are contrary to the letter and spirit of the electricity regime which promulgates encouragement and promotion of renewable sources of energy.

3.25. Based on the above submissions and grounds, the Petitioner has submitted that the Commission has the jurisdiction under the PPA between the parties as also under Section 86 (1) (e) and under Section 86 (1) (f) of the Electricity Act, 2003.

REPLY OF THE RESPONDENT-GUVNL:

4. The Respondent-GUVNL filed its reply dated 06.04.2021 and submitted that the above-mentioned petition filed before the Commission has no merit and is liable to be dismissed.
- 4.1. It is submitted that the Petitioner had entered into a PPA with the Respondent, GUVNL on 09.12.2010 for sale of power from the Petitioner's 5 MW capacity and on the basis of Tariff Order passed by the Commission.
- 4.2. It is submitted that the 5 MW project of the Petitioner Power Plant was commissioned on 18.04.2012 and as per GEDA letter dated 05.03.2012 the project was ready for commissioning on 27.01.2012. The commissioning of the project is based on the certification of GEDA which is required under the PPA. Such certification is based on the inspection of the panels as installed. On 09.05.2012 GEDA issued the

certificate of commissioning. Thus, the solar power projects had been commissioned based on the panels installed and inspected in 2012. Since the project of the Petitioner was ready for commissioning on 27.01.2012, the applicable tariff for the Petitioner's project was to be determined in terms of the Tariff Order dated 29.01.2010 in Order No. 02 of 2010.

- 4.3. The Respondent has not disputed the proceeding before the NCLT as stated in the Petition. The PPA dated 09.12.2010 continues to be in operation.
- 4.4. There is no provision in the Power Purchase Agreements or Orders or Regulations of the Commission regarding replacement of damaged solar panels during the life of the Project. The Tariff Orders of the State Commission are based on the commissioning of the project within the control period and the technology and cost of panels as applicable at the prevalent time. Therefore, installation of a new panel which may be cheaper would allow a generator to claim higher tariff.
- 4.5. As per the PPA, the Solar Power Producer/Generator is responsible for operation and maintenance of power project in a prudent manner for supply of contracted capacity to GUVNL throughout the term of PPA. Accordingly, there may be genuine requirement to replace damaged solar panels and equipment in order to enable them to fulfill their obligations under the PPA. It is, however, not open to the generators replacing the solar panel etc. to increase the installed capacity of the solar power projects and thereby increase the quantum of generation over and above what they would have been able to generate considering contracted capacity as per the PPA and the consideration in the Tariff Order and take advantage of the higher tariff which is available under the PPA as compared to the current market price of solar power.

4.6. Therefore with a view to streamline the procedures for replacement of damaged solar panel, and at the same time to ensure that the generators shall undertake such replacement activity which does not result into enhancement in capacity / increase in generation and injection of energy to take advantage of tariff agreed in the PPA, the GUVNL devised common Guidelines required to be followed by the generators for replacement of damaged solar panels, which briefly stated are as under:

- i. *“Damaged panels would mean panels that are damaged because of which they are not in a position to generate power corresponding to rated capacity of panels. Damaged panels would include panels with scratches or cracks, broken panels, burnt panels or any other kind of physical damage. Mere degradation of panels shall not be considered as damaged modules as degradation of panels is a natural phenomenon.*
- ii. *The generator shall have to seek prior permission of GUVNL before replacing any panel or making any modifications in the Project.*
- iii. *However, in case the project capacity is below 5 MW and the PPA has been signed with a Distribution Company in the State then the solar power project may seek prior permission of the concerned Distribution Company.*
- iv. *Upon receipt of request from the generator for replacement of panels, GUVNL / Distribution Company shall depute a team for physical verification of the solar project. Such inspection team shall consist of representative from Distribution Companies, GETCO and GEDA.*
- v. *The inspection team shall submit a Report after physically verifying the damaged panels and such Report shall be the basis for allowing replacement of panels certified as damaged.*
- vi. *GUVNL / Distribution Company may issue permission for replacement of damaged panels with panels of the same make and model installed*

at the time of commissioning of the Project as certified by GEDA in the Commissioning Certificate, if available. If the panels of same make and model are not available in the market, the generator may be allowed to install panels of a different make and model. However, the permission of replacement of panels is subject to the following conditions:

- a) The total installed capacity of the Project after replacement of damaged panels shall not exceed the contracted capacity under the PPA;*
- b) The total generation of the Project throughout the balance period of the Term of the PPA pursuant to replacement of the panels does not exceed the Base CUF. The CUF of the past period from the date of commissioning of the Project till the date of approval of replacement of panels shall be considered as the Base CUF for this purpose;*
- c) In the event of any excess generation beyond the Base CUF in any year during the balance Term of the PPA, the same shall be considered as excess generation and GUVNL/ Distribution Company shall not make any payment towards such excess generation; and*
- d) The new panels should comply with the BIS standards and are enlisted in the Approved List of Models and Manufacturers (ALMM) notified by Ministry of New and Renewable Energy (MNRE), Government of India.*

- vii. It is only upon receipt of permission granted by GUVNL/ Distribution Company, as the case may be, that the Generator shall be eligible to replace the panels certified as damaged.*
- viii. Once the damaged panels are replaced, the Generator shall inform GEDA under intimation to GUVNL / Distribution Company to visit the site and witness the Commissioning of the new panels. GEDA shall*

issue a certificate of commissioning of such new panels. The generator shall not make any changes in the Project after issue of such certificate from GEDA.

- ix. In case, any additional capacity is found to be connected at the time of site inspection, legal action including termination of PPA will be initiated on the basis that the seller has made arrangement to increase the quantum of generation over and above what they would have been able to generate considering installed capacity and to take advantage of the higher tariff under the PPA as compared to the market price of solar power tariff at present.*
- x. GUVNL / Distribution Company shall have the right to carry out surprise inspection of the solar project at any point of time for verification of installed capacity and if additional capacity is found be installed; GUVNL / Distribution Company shall be entitled to initiate legal actions for termination of the PPA.*
- xi. If the CUF of any plant increases beyond the Base CUF in any financial year, GUVNL/ Distribution Company will have right to inspect the project site and if it is found that any of the panels have been replaced without GUVNL's/ Distribution Company's permission, any generation beyond the Base CUF in any year shall be considered as excess generation and GUVNL/ Distribution Company shall not make any payment towards such excess generation.”*

The information memorandum allegedly filed during the IBC proceedings on 20.04.2019 with the NCLT, Ahmedabad, provides details of the Petitioner's Project as under:

"Current Scenario of Solar Plant:

- *Out of 58539 Panels, 49029 panels are in running condition. 4690 Panels have cracks/ Damage and balance 4820 panels were scraped.*
- *Plant is running on 80% capacity of their installed capacity i.e. 4.1 MW out of 5 MW."*

4.7. The above Information Memorandum was prepared based on information given by Petitioner's officers and GUVNL cannot verify the authenticity of the above. At this point, GUVNL had not been informed nor granted an opportunity to verify the alleged damage. There is no clarity on why certain panels were scrapped and to what extent there was damage. GUVNL had on 28.03.2019 already informed the Generators not to replace panels without prior permission of GUVNL. Despite the same, neither the Petitioner nor the Resolution Professional submitted any information to GUVNL. Further, any new applicants including the current management of the Petitioner were aware of the Letter dated 28.03.2019 written by GUVNL as this was prior in time even to the Information Memorandum.

4.8. The Petitioner only in May 2020, i.e. 29.05.2020, informed GUVNL that as per the Information Memorandum dated 20.04.2019, 1.3 MW of the plant is damaged. It is also submitted that as per the aforesaid details, it is evident that the replacement as being sought by the Petitioner would increase the plant capacity to 5.5 MW, which is in clear violation of the PPA dated 09.12.2010. Further, the Petitioner had claimed that the Information Memorandum had stated that 1.3 MW needed to be replaced whereas the Information Memorandum stated that 4.1 MW out of 5 MW was functioning. Thus, there is a clear disconnect from the Information Memorandum.

4.9. Thereafter, on 18.08.2020, the Petitioner again wrote to GUVNL stated that their plant was running at 80% of the original capacity. Thereafter, vide letter dated 21.09.2020 the Petitioner claimed that around 536 kWp of modules and 1*1000 KW central inverter were damaged, i.e. approximately 1.2 MW of the plant was damaged and needed to be repaired/maintained/replaced (as against 0.9 MW claimed in the Information Memorandum). The reasons cited for the said damage was

cyclone, heavy rains and floods that took place in the Gujarat region in the year 2016/17. The Petitioner also requested GUVNL to depute a team for site visit. The Petitioner again gave an undertaking to the effect that it has no intentions to enhance plant capacity beyond the provisions of the PPA, entered into with GUVNL.

4.10. It is submitted that in view of the Petitioner's request for site inspection, GUVNL wrote to the Distribution Companies in the State of Gujarat, GETCO and GEDA regarding inspection of the Petitioner's project to be held.

4.11. The site inspection was carried out on 04.11.2020 and the Inspection team consisted of officers of four state distribution companies, GETCO and GEDA.

- i. The Inspection team has mentioned as under, with respect to the 5 segments of the Petitioner's 5 MW Project.
- ii. In Segment No. 1 of the Project- only structures were found and no Solar PV Modules were mounted on such structures. Therefore, in the absence of any modules, the inspection team was unable to verify their status;
- iii. In Segment Nos. 2 to 5- 645 existing modules with capacity of 54.83 KW were found damaged.

4.12. In pursuance to the inspection, vide letter dated 12.11.2020 the Deputy Engineer, Baroda City Circle, MGVCL, wrote to GUVNL stating that in Segment No. 5 of the Petitioner's project 82 modules were found to be in good condition but they had not been connected.

4.13. In view of the above inspection, GUVNL vide letter dated 10.12.2020, conveyed to the Petitioner that in terms of the inspection carried out on 04.11.2020, 645 existing modules with capacity of 54.83 KW were found damaged, and that the Petitioner was permitted to replace the same in a manner that the capacity of the replaced new modules does

not exceed 54.83 KW and listed other conditions in terms of GUVNL's policy for replacement of solar panels.

4.14. There is variance in the stand taken by the Petitioner in its various communications, it can be seen that the stand of the Petitioner is inconsistent and is further based on reports conducted in 2019 and such damage was only conveyed to GUVNL on 29.05.2020. There is absolutely no justification for the same particularly when the Petitioner was well aware that any replacement of panels can be done only after GUVNL verifies the damage. If not, this would allow any generator to install cheaper, more efficient panels with higher capacity/CUF and still claim higher tariff as per PPA.

4.15. The Petitioner has been permitted by GUVNL to replace 645 damaged modules, as have been verified during the Inspection dated 04.11.2020. The replacement of such modules may be done in such a manner that the replaced modules do not exceed 54.83KW in order to retain the same level of total power capacity of the system (module rating × number of modules), and the total generation and thereby the CUF of the project does not increase, or is contrary to the terms of the PPA dated 09.12.2010 or Tariff Order dated 29.01.2010.

4.16. The Petitioner has constantly undertaken that its plant capacity will not exceed 5 MW and that it shall abide by the terms of the PPA, and now it is seeking to negate the said undertaking, by attempting to increase plant capacity/CUF, and seeking to replace the solar modules without prior permission from GUVNL.

4.17. It is submitted that even in terms of the Petitioner's own admission vide letter dated 29.05.2020, the replacement as being sought by the

Petitioner would increase the plant capacity to 5.5 MW. This is in clear violation of the PPA, and cannot be permitted by GUVNL.

- 4.18. The cost of solar panel has significantly reduced today since 2010, when the tariff was determined. Taking advantage of the same, some solar power generators had been trying to add additional solar panels or replacing older panels with more efficient solar panels in their old power projects in order to generate more electricity and receive the higher tariff even though the costs associated with the said generation was much lower. If the said solar panels were installed in a separate power project, the tariff as on date available would be Rs. 1.99 per unit – Rs. 2.50 per unit. If the Petitioner were allowed to increase plant capacity and hereby CUF, then this would seriously prejudice consumer interest, as the Petitioner would be getting more tariff, while its cost of production would have gone down. The Respondent, has the option to avail cheaper and more economical sources of power and the Petitioner cannot benefit at the cost of consumers in the State of Gujarat.
- 4.19. The Petitioner is to operate and maintain the plant in a prudent manner, and it is not open for the Petitioner to increase the installed capacity of the plant thereby increasing quantum of generation above 5 MW. Further, the Petitioner cannot replace the panels when the applicable tariff is based on panels being commissioned in the control period of the Tariff Order 2010 and after considering CUF and costs of the panels. In such cases, the Petitioner can only be entitled to tariff as applicable on the date of the installation/commissioning of the panels being installed.
- 4.20. The claim of the Petitioner that the plant damaged due to cyclone and floods, it is clarified that the Petitioner has never approached the Respondent, GUVNL after 28.03.2019 and it was only in May 2020 that the GUVNL was informed of any issue with panels. The Respondent

relied upon Article 8.1 (c) of the PPA and submitted that not only did the Petitioner not serve the notice within 7 days, in fact the said events were brought to GUVNL's notice over 4 years later and even then, no force majeure notice was issued. The issuance of notice a mandatory requirement and without such notice, there can be no claim made or relief granted for force majeure.

4.21. The Respondent has submitted that when the contract requires notice to be issued, such notice is required to be issued in the time frame provided and as per the requirement of the contract. The Respondent has referred the following Judgments in support of its arguments:

- i. Krishna Kilaru & Another -v- Maytas Properties Limited (2013) [176] Comp Cas 483 [AP].
- ii. Raichur Sholapur Transmission Company Limited -v- Power Grid Corporation of India Limited.
- iii. Talwadi Sabo Power Ltd. -v- Punjab State Power Corporation Limited.

4.22. It is submitted that the Respondent had written letter dated 28.03.2019 much before the information Memorandum and despite the same, GUVNL not apprised of any issue until May 2020. The Letter dated 28.03.2019 was written as it was apprehended that the solar power projects were enhancing the capacity of plants of replacing panels in order to take advantage of higher tariff as provided in Order dated 29.01.2010 and 27.01.2012.

4.23. The Respondent GUVNL denied that there are 9,510 modules 10,437 modules (As per M/s Chemtrols Solar Pvt Ltd's report on page no: 145), or 10,250 modules require replacement at the Petitioner's plant. It is submitted that as per the Report of the site inspection done by Officials from GEDA, GETCO as well as 4 state Distribution Companies, only

645 modules in the Petitioner's plant are damaged and are eligible to be replaced. The letter dated 10.12.2020 of the Respondent was reasonable and to ensure that the Petitioner does not make undue profit by the replacement of panels. The replacement of panel was only to put the Petitioner in the same position as it would have been had the panels not been damaged. The Petitioner cannot claim higher CUF or higher generation on account of such replacement of panels. These panels are being installed in FY 2020-21 and cannot be entitled to tariff as applicable for control period 2010-2012.

- 4.24. The Petitioner has made varying claims in regard to the alleged damage. Even as per Information Memorandum, 4.1 MW out of 5 MW was functional and the Petitioner then claims that 1.3 MW was not functional.
- 4.25. The Respondent was first informed of the alleged damage caused to the Petitioner's plant, only on 29.05.2020 though the Petitioner claims that the damage was due to floods/cyclones in 2016/17. Thereafter, as invited by the Petitioner, an inspection was carried out in November, 2020, verifying the extent of damage and the officials found only 645 modules to be damaged and in terms of the procedure, the Petitioner was given permission to replace the 645 panels.
- 4.26. The Petitioner did not inform GUVNL at the relevant time of the damage occurred or of such reports stating that there had been damage to the Petitioner's plant. When the verification was done by the team and the damage verified, GUVNL has given permission for replacement of panels. The Petitioner's claim that the officials conducting the Site Inspection missed out on certain modules as they were on the side/in scrap is untenable.

- 4.27. The team was unable to verify the missing modules in segment-1 as they had been scrapped and were allegedly kept on the side/scrapped. The Petitioner had been aware of GUVNL's policy with respect to physically verifying the damaged solar modules, yet it chose to scrap the modules; GUVNL without actual verification cannot permit the Petitioner to replace the modules, as it may lead to capacity and/or CUF enhancement, especially given the varying stand in the Petitioner's claim of damaged panels.
- 4.28. It was up to the Petitioner to ensure that the modules are available for inspection. The Petitioner cannot subsequently make excuses or justifications as to why the panels were not available for inspection. The Petitioner had invited GUVNL for inspection and was aware of the inspection team's visit. It should have ensured that the modules or panels are not removed before inspection.
- 4.29. The Petitioner was well aware that modules needs to be verified. GUVNL cannot be held responsible for the Petitioner having already purchased the solar modules without seeking prior consent of GUVNL, especially in light of the fact that the Petitioner was aware of GUVNL's policy with respect to replacement of Solar Panels. The Petitioner had raised the issue only in May 2020 and had been in talks with GUVNL since then regarding replacement of panels. There is no reason for Petitioner to have purchased the new panels. It is submitted that the Respondent cannot be held responsible for imprudence on the part of the Petitioner leading to degradation of modules, if any. Further, the Petitioner has already been given permission by GUVNL to replace 645 modules as were verified during the site inspection held on 04.11.2020, therefore there is no embargo on the Petitioner replacing the said modules. However, the Petitioner cannot be permitted to install or replace modules where the damage is not verified.

- 4.30. There is no error or arbitrariness or otherwise any error in the actions of GUVNL. The actions of GUVNL are consistent with the PPA and the Tariff Orders passed by the Commission. It is wrong and denied that the condition pertaining to Base CUF sought to be imposed by GUVNL is arbitrary, unilateral, amounts to revisiting the PPA or deserves to be quashed. Once commissioning certificate is issued by GEDA, the generators cannot alter the capacity of their solar project, or the modules/panels based on which the project was commissioned. When the tariff has been allowed to the Petitioner based on the date of commissioning. GUVNL has however allowed for replacement of panels in case there is any damage to the project, when the generators may be permitted to carry out repair and maintenance work and replacement of solar modules and this is subject to prior permission as well as physical inspection being carried out by the Respondent. This is to ensure that the replacement is only for actual damage to the panels/modules.
- 4.31. The Respondent has not denied any genuine requests being made by the solar power developers in replacement of solar modules due to damage. However under the guise of such replacement, the generators cannot be permitted to enhance the capacity of their project, or seek to increase the quantum of generation over and above what they would have been able to generate considering the earlier modules/panels based on which they were commissioned and claimed tariff. The Generators cannot take advantage of the higher tariff which is available under the PPA as compared to the current market price of solar power.
- 4.32. The cost of solar panel has significantly reduced today since 2010, when the tariff for the Petitioner's project was determined. Taking advantage of the same, some solar power generators had been adding additional solar panels or replacing older panels with more efficient solar panels

in their old power projects in order to generate more electricity and receive the higher tariff even though the costs associated with the said generation was much lower.

4.33. The Solar Tariff Order of the Commission dated 29.01.2010 considers the CUF. In view of the fact tariff for solar generators has been determined by the Commission based on the high capital cost of the solar panels and taking into account the CUF therefore the Petitioner cannot now claim the same tariff for newer panels. There can be no case for the Petitioner to state that the limit of Base CUF imposed by GUVNL is bad in law. The Petitioner's claim for number of damaged modules is inconsistent and untenable. The Petitioner is claiming different numbers of solar modules. As per verification by the officials deputed by GUVNL, only 645 of the modules are damaged and therefore only such modules can be replaced.

4.34. The Petitioner has permission to replace 645 numbers of modules in such a manner that the capacity of the replaced modules does not exceed 54.83 KW in order to retain the same level of total power capacity of the system. The claim of the Respondent that 1.3 MW of plant is damaged is denied. This is without any basis and in fact contrary even to the Information Memorandum relied on by the Petitioner. The Petitioner has claimed different capacities at different times. Only 645 modules were found to be damaged. The report of the inspection committee is based on the actual physical verification of the Petitioner's project, conducted by the officials of GEDA, GETCO and the State DISCOMs.

4.35. The 645 modules found damaged by the Committee are based on what was actually observed by the Committee on site. The replacement can only be permitted when the damage to the modules is physically

verified. GUVNL cannot agree to replacement of modules/panel only on assurance of Petitioner that there was damage and that it has scrapped the modules. The claims of the Petitioner are based on 2019 reports i.e. much before GUVNL was appraised of such damage and further the said reports too, show varying numbers in terms of the damaged modules, and therefore not reliable. The Petitioner has claimed different capacities at different times. In any case, it is reiterated that only 645 modules were found to be damaged.

4.36. The procurement of modules, if any by the Petitioner is neither within knowledge of GUVNL nor is it the responsibility of GUVNL. The Petitioner was aware that it would need approval of GUVNL and the damage would have to be verified. If it chose to procure additional panels, the same is entirely to its account.

4.37. It is reiterated that the Petitioner has been unable to demonstrate how 9510 modules needs to be replaced. The Petitioner despite being aware that approval of GUVNL would be required, did not communicate to GUVNL until 2020 and even at that time, was unable to demonstrate the alleged damage to 9510 panels. The alleged Information Memorandum or report by Chemtrols Solar Pvt ltd is not binding and is not proof. The Petitioner chose not to involve GUVNL in any of the inspections and only intimated to GUVNL in 2020.

4.38. The Petitioner has not considered its own delays including that it had requested for site visit only on 21.09.2020. Further the site visit requires formulation of a team. In view of the Petitioner's request through letter dated 27.10.2020 and received on 29.10.2020 for site inspection, GUVNL wrote to GETCO, GEDA and the State DISCOMS regarding inspection of the Petitioner's project and accordingly, the site visit conducted by the officials of GETCO, GEDA and the State

DISCOMs on 04.11.2020 and the report was officially communicated to the Petitioner on 10.12.2020. It is unreasonable for the Petitioner to expect GUVNL to carry out inspection in a lesser duration, given that fact GUVNL had to coordinate with various other agencies and also that the inspection was carried out during pandemic times.

4.39. It is submitted that the delay, if any, is solely attributable to the Petitioner, who waited until 2020 to bring to GUVNL's notice the damage that was allegedly caused in 2016/2017.

4.40. The Petitioner has considered its own delays, it is Petitioner itself who had admitted vide its letter dated 29.05.2020 that if the replacement would be carried out in terms of its requests the module capacity will increase to 5.5 MW as opposed to 5 MW envisaged under the PPA. Therefore, the Petitioner is now attempting to mislead by stating that the replacement would be in complete compliance with the PPA. Even otherwise, it is submitted that the Petitioner cannot be permitted to carry out replacement when there is no damage to the panels/modules. The issue is not just of capacity but of CUF and tariff also. The Petitioner cannot claim the tariff as applicable for panels/modules commissioned in 2012 for panels/modules commissioned in 2020 or 2021. The PPA also recognizes that the tariff would be applicable as per date of commissioning. The Respondent actions have led to a recurring loss to the Petitioner, GUVNL has based on verification and inspection done by a team consisting of GEDA, GETCO and 4 State Distribution Companies has permitted the replacement of 645 modules and the same was done without any delay. The claim of 1.3 MW capacity being due to damaged solar panels is not admitted. The Petitioner has claimed different capacity at different times in different communications. Even as per Information Memorandum it was only 0.9 MW. However, it is denied that any module beyond 645 modules were damaged.

- 4.41. It is submitted that the claim of deprivation of tariff for 1.2 MW is incorrect even as per the claim of Petitioner based on Information Memorandum. The Petitioner has claimed different capacity/modules in different communications. Even in the Petition, the Petitioner is claiming 1.3 MW whereas as per Information Memorandum, it was only 0.9 MW. In any event, the claim of 1.2 MW or 1.3 MW is even otherwise incorrect. The damaged modules of 645 as verified by the team only amounted to 54.83 KW.
- 4.42. The Petitioner's claim for extension of the first 12 years of the PPA, is baseless and devoid of any merit. There is no such provision in the PPA for any extension during the term of the PPA. The Petitioner has already been granted permission to replace 645 modules vide GUVNL's letter dated 10.12.2020. However, the Petitioner has not provided the status with regard to the said modules.
- 4.43. It is submitted that it is in fact the Petitioner who is seeking to circumvent the prescribed procedure, enhance capacity and thereby CUF leading to a lower cost of generation, yet still claiming higher tariff based on old modules. This is contrary to public interest and the Petitioner cannot be permitted to do the same. The promotion of renewable sources of energy does not mean that the Petitioner is entitled to take undue advantage.
- 4.44. The Petitioner is not entitled to any relief as claimed or otherwise. There is neither any contravention of PPA read with Tariff orders nor can Petitioner be permitted to replace modules at its own whims and fancies and compelling GUVNL to procure solar power from such new modules commissioned in 2021 at tariff applicable for control period 2010-2012. Further there is no provision for extension of time under PPA after the

commissioning of the project and even otherwise no such extension can be considered. There is no delay by the Respondent.

4.45. The Respondent GUVNL has computed the average annual CUF as well as the average CUF for the entire period from the date of commissioning till date of approval of replacement of modules, i.e. 10.12.2020 based on such gross energy injected and such “Base CUF” works out to 14.34%.

4.46. The Respondent submitted that the said data demonstrated that the claim of the Petitioner in regard to alleged damage to the panels in 2016 or 2017 is not correct and it does not support the fact that there was any external reason damaging the panels as claimed by the Petitioner.

4.47. GUVNL has clearly contended that the CUF cannot be higher than the Base CUF which has been duly noted by the Commission.

4.48. Based on the above submissions the Respondent has submitted that the same may be rejected.

REJOINDER OF THE PETITIONER:

5. In response to averments made by the Respondent in their reply, the Petitioner in its rejoinder-in-reply stated as under:

- i. PPA governs operations of Solar plant for a period of 25 years. Damage of Solar panel and wear and tear is essential part of this long-term contract. Therefore, PPA embodies that the replacement of damaged solar panel is sole responsibility and prerogative of the Power Producer being part of Operations and Maintenance. No role or permissions is envisaged in PPA of the respondent for this purpose.
- ii. The Respondent has not been given any authority or regulatory power to restrain the Petitioner from replacement of damaged

Solar Panels as long as it is within the Installed Capacity. There is no provision in the Tariff Order and / or PPA with respect to Control Period, the technology and Cost of the Panels as alleged by the Respondent.

- iii. The Respondent's statement that installation of a new panel which may be cheaper would allow a generator to claim higher tariff is totally misconceived and factually wrong. In case of replacement of damaged panels, no new panel is put up leading to additional capacity.
- iv. The cost of repairs / replacement is an additional cost which a power producer incurs which is over and above the original cost of putting up power plant incurred by the Petitioner. The Petitioner incurred Rs. 75.43 Crores as Capital Cost for putting up a 5 MW PV based Solar Power Plant in the year 2012. This Cost of repairs / replacement will further increase cost by Rs. 3.50 Crores (approx.) (Out of which it has already incurred Rs. 2.93 Crores for procurement of various parts including panels) thereby taking total cost of 5 MW Power Project to Rs.78.93 Crores (approx.).

5.1. It is submitted that that Respondent itself acknowledges that there may be genuine need to replace damaged solar panels and equipment in order to enable power producer to fulfil its obligations under the PPA. Since the petitioner is replacing only damaged Solar Panels with new ones by no stretch of imagination it can be termed as increasing the Contracted Capacity as per the PPA.

5.2. To allay the doubts raised by the Respondent, the Petitioner hereby undertakes that repaired / refurbished capacity of the Power Plant will not exceed 5 MW which is the installed capacity of the Solar Plant and will not generate any quantum over and above contracted capacity as

per the PPA. Even though CUF is not relevant, the CUF after due repair/replacement shall not exceed 20% which is taken by the Commission in tariff determination order dated 29th January 2010.

- 5.3. The Common Guidelines of repairs / replacement has no force of law or binding effect on the parties as it is neither part of PPA nor emanates out of any other agreement entered between the parties nor has any statutory authority for the same. The statement made by the Respondent even doesn't spell out who has issued these guidelines and under what authority, where it is published in GR of Govt of Gujarat or GUVNL. GUVNL has no legal status or authority to modify, change or propose any contrarian plan which is against the letter and spirit of PPA. After receiving the reply of the Respondent, the petitioner tried to search about its existence but could not find it anywhere including on the Web- site of GUVNL.
- 5.4. It is submitted that the Respondent has tried to create smoke screen and doubt about intention of Petitioner by referring different nos. of damaged / destroyed / scraped Panels requiring repairs and replacement. In this connection the Petitioner made the following submissions:
- a) The present management is new management of the Petitioner which came in control in May, 2020 only pursuant to order of NCLT, Ahmedabad w/s 31(1) of IBC Act, 2016. Before that it had no access to the physical site or data of the company save and except the Information Memorandum (IM) published by Resolution Professional appointed by NCLT. Nos of damaged / destroyed / scraped PVs given IM are assessment of RP and its team.

- b) Communication dated 29th May, 2020 was based on the IM and there was urgency to implement the remedial plan as it was an obligation under the Resolution Plan on the new management.
- c) The new management appointed External Technical Agency to visit the site and make remedial plan to repair and replace the PV which were damaged / destroyed / scrapped over a period of time. The nos given by them are their technical assessment of site visit.
- d) In all the communications the Petitioner has maintained that there are 9510 panels requiring repairs / replacements.
- e) The different capacity utilisation given in various correspondences needs to be evaluated in the light of the above facts and also in the light of the undertaking given by the Petitioner not to exceed beyond 5 MW which is contract capacity.
- f) In all the correspondences with GUVNL it is mentioned that the Petitioner have no plans / designs to enhance the capacity beyond the contract capacity as provided in the PPA. Also in all the correspondences it is mentioned that the Petitioner is working out plan to do the needful repairs / refurbishing to restore the plant capacity of 5 MW as per the Contract and there is no case of exceed this capacity.

5.5. The Petitioner has submitted that by their own admission the Respondent has confirmed that a technical team consisting of officers of four state distribution companies including GUVNL, GETCO & GEDA visited the site of the Petitioner on 4.11.2020 for physical verification. It is an admitted position that this Power Plant had contract capacity of 5 MW. It has 5 Segments and Segment No. 1 solar panels were completely damaged due to heavy cyclonic rains in the past and had been scrapped. Since the petitioner was passing through severe financial crunch it could not take up the repairs / replacement work.

- 5.6. It is submitted that that is the reason the Petitioner went through bankruptcy proceedings in NCLT. Upon change of management pursuant to NCLT order dated 19.3.2020 the new management has taken over the management of the company and have started rehabilitation exercise including but not restricted to at solar Plant.
- 5.7. It is submitted that there is no intention or attempt to take any undue advantage in the form of enhancing the installed / contract capacity of the Power Plant. It is submitted that the contention raised by the Respondent is totally untenable, impractical, and devoid of any merit and is an attempt to deprive the petitioner of its legitimate right of producing and selling to the Respondent power upto 5MW. There is no clause in either PPA dated 9.12.2010 or Tariff Order dated 29.1.2010, which in any way suggest that even with repairs of Panels by the Power Producer will be required to restrict its production to the level which was in existence prior to the repairs or qua any level during the operating period. Repairs / replacement of the panels is a normal feature in any industry which has an operating life of 25 years. Any attempt to restrict generation capacity qua any past performance is totally wrong and untenable and will be contrary to the letter and spirit of GERC order and PPA. Only restrictive covenant which governs operations and contractual arrangement between the parties is that the generator should not generate more than Contract Capacity which is 5 MW in the present case. The Petitioner submitted that the Respondents are trying to create a confusion, by mixing the terms, plant capacity and CUF which are totally different parameters. The Respondents have themselves admitted that the Petitioner has constantly undertaken that its plant capacity will not exceed 5 MW, and that it shall abide by the terms of PPA.
- 5.8. The Petitioner further made following submissions:

- (a) As per the PPA, the sole responsibility of operations and maintenance is cast upon the Petitioner. No provision of the PPA restricts the Petitioner from doing requisite repair/replacement, needed in view of the prudent operation and maintenance, within the contracted capacity.
- (b) No provision of PPA, empower the Respondents, to restrain or restrict the Petitioner from repair/replacement, needed in view of prudent operation and maintenance within the contracted capacity.
- (c) Regarding the Protocol or Guidelines for repair/replacement as submitted by the Respondents, stated that these Protocol or Guidelines for repair/replacement have no authority from PPA or any other law of the country.
- (d) The Petitioner has already given undertaking that they do not intend to enhance the plant capacity by the repair/replacement.
- (e) The plant capacity and CUF are different entities, and they cannot be equated.

5.9. It is submitted that at one place in letter dated 29.5.2020 by mistake plant capacity of 5.5 MW was mentioned. This is plain typographical error. As in the same letter and all subsequent letters the Petitioner has stated that the Contract capacity of the Plant is 5 MW, and the Petitioner will maintain the same post repairs / replacement.

5.10. The contention about present capital cost and prevailing rates and capacity of each panel is totally irrelevant to the present question and is solely aimed to divert the attention to irrelevant issues. As clarified above the cost of Repairs / replacement is an additional cost to the capital cost already incurred and there is no increase in the overall installed / contracted capacity of Power Plant as the same remains at 5 MW only.

- 5.11. Further what other generators are doing, is not relevant here. In Petitioner case the Petitioner only replacing the damaged panels within the overall approved contracted capacity of the plant as per PPA. Since there is no additional capacity created and respondent is duty bound to purchase the power generated within Contract Capacity.
- 5.12. The Petitioner has clarified that onus of O&M casts upon the Petitioner and the Petitioner is duty bound to maintain its solar power project until the contract period, i.e. 25 years completes. The only objective of the Petitioner to allow for the repairing/replacement of the solar modules to achieve contracted capacity of 5 MW as per the terms of the PPA and the necessary compliance shall be adhered by the Petitioner in the course of repairing/replacement of the solar modules.
- 5.13. The Petitioner clarified that the Petitioner got physical possession only on 25.05.2020 and hence, the compliance of provision of Article 8.1 (c) is not maintainable prior to the date of 25.05.2020 and the relevant case laws cited in the reply by default is not tenable in the eyes of law.
- 5.14. The Petitioner submitted that the MNRE letter dated 05.11.2019 is advisory in nature and Petitioner has tried to bring to the Notice of the Respondent GUVNL, in context with varying CUF averred in the said dated letter. It is accepted to the Petitioner that it does not form a part of the PPA. Therefore, the Respondent GUVNL is kindly requested to go through the details placed on the record which includes various technical details before rejecting the claim of the Petitioner. It is further submitted that Petitioner is not going to overrule any provision enshrined in the PPA and without due diligence according to the prescribed procedure of Law. The repairing/replacement of the solar plant panels/modules shall be complied in accordance with the direction given by the Commission.

5.15. The Petitioner has claimed for the replacement of the solar modules based upon the technical report submitted to it. The Petitioner tried to bring to the Notice of the Respondent GUVNL that huge difference has been found in replacement of solar power modules.

5.16. The Petitioner has submitted that in order to replace / repair the solar modules, the Petitioner had brought solar modules and delivered at the project site. The Respondent submitted that timely replacement of solar module is need of hour as it is prone to degradation. Petitioner never levelled any kind of allegations to the Respondent, in case of occurrence of degradation of solar modules. Petitioner appreciates permission granted to replace the 645 solar modules according to the inspection report dated 04.11.2020.

5.17. However, Petitioner is sure that the replacement of the 645 modules shall not serve the purpose to achieve 5 MW power generation. The rights and contentions of the respective parties shall be placed before the Commission that in case of any additional solar modules requires to be replaced in addition to the suggested solar modules by GUVNL i.e., 645, to achieve targeted capacity of 5 MW solar power generation, the final decision of the Commission shall be complied with.

5.18. It is submitted that in case of Solar Photovoltaic (SPV) Project, Capacity Utilisation Factor (CUF) is the ratio of actual energy generated by the Solar Power Plant over the year to the equaling energy output at its rated capacity over the yearly period. One Solar plant of 1 MW capacity, does not give output of 1 MW, round the year. But it depends on many things like;

- Location of the plant
- Sunshine hours
- Type and quality of Solar Panels used
- Operation and maintenance standards of the plant.

5.19. The only relevance of CUF in the context of PPA can be fixing the Generic Tariff by GERC's Order No. 2/2010 dated 29.1.2010 has directed as follows:

4.10. Capacity Utilization Factor (CUF):

“The energy generation for Solar Power project depends on Solar radiation measured in KWH/ sq m/day and number of clear sunny days. The output of Solar Cell is measured in terms of Wp (Watt Peak) and refers to nominal power under Standard Test Conditions (STC (1000 W/m@, 250 C, 1.5 PM). The capacity utilization factor depends on site specific parameters like insolation & ambient conditions as well as the technology adopted for power generation, viz SPV or STP.

After considering the above aspects the Commission had proposed CUF at 20% for SPV and 25% for STP.”

By linking Base CUF with past performance of the unit which was which was admittedly affected due to fully damage of Segment No. 1 and lack of maintenance of the balance plant due to bad financial condition of the company has affected actual CUF of the plant for the past period.

5.20. The CUF may vary subject to different seasons and parameters stated herein above hence it is not a violation of Law. Petitioner neither intends to generate power beyond the contracted capacity of 5 MW nor intends to claim any higher tariff. The question does not arise for any higher tariff as alleged stating that:

‘Generator cannot take advantage of the higher tariff which is available under PPA as compared to the market price of solar power. In effect, the petitioner is seeking to claim the tariff applicable in 2010 for equipment installed in 2021.’

5.21. Under the circumstance, Petitioner reserves its right to replace required number of solar modules to achieve installed capacity of 5 MW.

Petitioner submitted that all technical parameters shall be taken into consideration in order to maintain KW capacity.

- 5.22. The matter is sub-judice before the Commission. It is further agreed by the Petitioner to comply with the norms and procedure as directed by the Commission. However, in case of any differences arise between the parties, it shall be brought to the Notice of the Commission for the necessary direction. The averments made by the Petitioner is based upon the technical report and it is not haywire.
- 5.23. The Petitioner has submitted that Respondent GUVNL can take the cognizance of the facts about the damaged solar modules to the tune of 9510 by referring in the memo of petition. It is submitted that the physical possession of the plant obtained to the Petitioner in May - 2020 only.
- 5.24. The solar power plant was not maintained from 2016 until transfer of physical possession due to lack of fund in the hands of erstwhile management of the company. Once the new management has taken the reins in its own hands, immediately process started with regard to O&M.
- 5.25. It is submitted that the event of damage occurred in 2016 is informed to the GUVNL in 2020 under the helm of legal rights available to the new management after getting physical possession of the solar power plant. In case of any immovable property right, title, interest and possession are the important ingredients which is being established by way of applying legal formalities. So, delay and latches according to the Respondent GUVNL with regard to damage occurred in 2016 informed in 2020, is not maintainable because legal possession of the solar power project was ensured in May - 2020 only.

5.26. The solar power project is not functioning at its fullest capacity of 5 MW due to damage occurred to it. Without prejudice the dispute with regard to the replacement of number of solar modules is now sub-judice before the Commission. The final compliance report shall be submitted to the Commission to come to an end of the dispute with regard to replacement of modules to achieve full-fledged functioning of Petitioner's solar power plant.

5.27. It is submitted that Petitioner reserved its right to claim for the extension of the first 12 years of the PPA because the solar power project was not operational to its fullest capacity since - 2016. Hence the said period need to be compensated as claimed as an extension of first-time block in the prayer clause which falls under Article - 8 of the PPA provision bearing title Force Majeure OR to be reckoned as Act of God.

5.28. The petitioner has never claimed for higher tariff, therefore it does not circumvent the prescribed procedure to enhance capacity.

FURTHER REPLY OF RESPONDENT-GUVNL:

6. The Respondent stated that in Order dated 29.01.2010 the Commission has noted that there is a declining trend in the cost of solar PV projects. The Commission has proceeded with the clear position that there will be decline in the cost of establishing the solar project being set up in future as compared to the capital cost and other financial considerations.

6.1. The panels now being installed are not commissioned during the control period of the Order dated 29.01.2010. The Petitioner has stated in their letter dated 27.10.2020 that the cost of the installation of 1 MW is Rs. 2.25 Crore which is much lower than the cost considered in the Order dated 29.01.2010.

- 6.2. The Respondent denied that the element of CUF has been introduced as late as 2019, to deprive the power producers of their legitimate rights. The Petitioner is to operate and maintain the plant in terms of the PPA dated 09.12.2010 and the tariff order dated 29.01.2010 of the Commission, specifying norms of operation, including CUF. The Petitioner is to operate and maintain the plant in a prudent manner, however it is not open for the Petitioner to increase the installed capacity of the plant thereby increasing quantum of generation above 5 MW which is also the recognized capacity in the PPA.
- 6.3. The Petitioner cannot replace the panels and commission new panels in the year 2019 or 2020 when the applicable tariff is based on panels being commissioned in the control period of the Tariff Order and after considering CUF at such time. The Petitioner can only be entitled to tariff as applicable on the date of the installation/commissioning of the panels now being installed. Once commissioning certificate is issued by GEDA, the generators cannot alter the capacity of their solar project, or the modules/panels based on which the project was commissioned.
- 6.4. If there is any genuine damage, then the generators may be permitted to carry out repair and maintenance work and replacement of solar modules and this is subject to prior permission as well as physical inspection being carried out by GUVNL. This is to ensure that the replacement is only for actual damage to the panels/modules.
- 6.5. The power producers have no absolute and exclusive right to replace the damaged solar panels under law. Further to ensure that the replacement does not entitle the Generators to make additional profit or gain under the guise of replacement of panels, the condition of the Base CUF has been provided. The operation and maintenance of the

power project does not allow for higher CUF/capacity under the guise of replacement of solar panels/modules.

- 6.6. The Petitioner has been well aware that any replacement of panels can be done only after GUVNL verifies the damage. If not, this would allow any generator to install cheaper, more efficient panels with higher capacity/CUF and still claim higher tariff as per PPA.
- 6.7. The Petitioner cannot be permitted to carry out replacement without considering factors of CUF and tariff also. The question is not just of capacity. The Petitioner cannot claim the tariff as applicable for panels/modules commissioned in 2012 for panels/modules commissioned in 2020 or 2021. The PPA also recognizes that the tariff would be applicable as per date of commissioning.
- 6.8. The reliance on the Article 12 of the Constitution is not correct as this is not an issue of exercise of fundamental right and the Commission is not a Writ Court. Further the Doctrine of legitimate representation claimed by the Petitioner is presumably a reference to principle of legitimate expectation which is in any case not applicable to the present case. Further the doctrine of promissory estoppel does not apply.
- 6.9. The power producers are equally bound by the terms and conditions of the PPA. The commissioning of the project is based on the certification by GEDA which is a required under the PPA. Such certification is based on the inspection of the panels as installed. The solar power project had been commissioned based on the panels installed and inspected in 2012. Further the Order dated 29.01.2010 and PPA also recognizes the applicability of the tariff to equipment commissioned within the control period.

- 6.10. The Petitioner can only be entitled to tariff as applicable on the date of the installation/commissioning of the panels. A condition of CUF is necessary, to ensure that the Petitioner does not by its actions exceed the capacity/CUF of the plant and then claim any relief in this regard.
- 6.11. In the event of a bona-fide requirement to replace the damaged solar panels and equipment on account of reasons or factors not attributable to generator and in order to enable them to fulfil their obligations under the PPA, a limited replacement of panels is being allowed with conditions and stipulations as mentioned in the preliminary submissions herein above.
- 6.12. The doctrines of legitimate expectations and promissory estoppel have no application to the present case. It is submitted that the Petition No. 1320 of 2013 before the Commission was filed for re-determination of tariff. The Appeal against the same is now pending before the Hon'ble Supreme Court being Civil Appeal No. 10301 of 2014 wherein the Petition has been admitted and is pending. The Petitioner cannot raise any issue in relation to the same in the present proceedings.
- 6.13. The issue of Base CUF has come into picture in view of the request of the Petitioner for replacement of solar panels instead of continuing with the panels which were installed within the control period of the Tariff Order. The cost of solar panels has significantly reduced today since and the Generators such as the Petitioner cannot be allowed to add additional panels or replace older panels with more efficient solar panels in their old power projects in order to generate more electricity and receive the higher tariff even though the costs associated with the said generation was much lower.

6.14. The Petitioner cannot under the guise of operation and maintenance replace and add panels. The PPA requires commissioning certificate which certificate is based on panels installed at the time of commissioning and further the Tariff Order recognizes the equipment to be installed during the control period. It is up to the Petitioner to operate and maintain the power plant however the said panels installed in 2020 or 2021 cannot claim tariff as applicable in 2010 or 2012. The only reason GUVNL verifies the claim for replacement and damage of solar panels is because under the guise of repair the power producers cannot be permitted to enhance the capacity of the Project. Therefore, the Petitioner is entitled to replace the damaged panels as long as it follows the procedure for replacement as laid down by GUVNL as noted by the Commission in its Daily Order dated 06.07.2021.

6.15. With regard to data placed by Petitioner, it is submitted that there is a difference in the data of generation and CUF. GUVNL has submitted the data of generation in its Additional Submissions dated 27.07.2021 which shows variation, hence the same is denied. It is reiterated that there is no provision in the Power Purchase Agreements or Orders or Regulations of the Commission regarding replacement of damaged solar panels during the life of the Project. Therefore, it is denied that replacement of panels is a normal feature. As submitted hereinabove, the tariff is provided for the panels installed on the date of commissioning and the Petitioner cannot seek the tariff of 2012 for panels installed in the year 2021. The tariff is based not only on capital cost but also on CUF. If the Petitioner install new panels with higher efficiency resulting in higher generation than otherwise it would have been generated if the equipments had not been damaged, then the Petitioner will be recovering higher tariff for such additional units despite not incurring higher cost for which higher tariff was determined.

6.16. In fact, the entire purpose of the mechanism and protocol given by GUVNL is that the Generators are put in the same position as with old panels and that is why the Base CUF is based on the average of actual CUF of the Petitioner. The fact that the Petitioner is disputing such Base CUF would mean that the Petitioner is seeking to take advantage of replacing panels to claim more generation and higher tariff since the costs of panels have substantially come down nowadays. The Petitioner has been permitted to replace 645 damaged modules after visit by GUVNL personnel.

6.17. It is denied that 9510 modules have been damaged. The Petitioner has been unable to demonstrate how 9510 modules needs to be replaced. The Petitioner despite being aware that approval of GUVNL would be required, did not communicate to GUVNL until 2020 and even at that time, was unable to demonstrate the alleged damage to 9510 panels. The Inspection team consisting of GEDA, GETCO and Distribution Company only found damage to 645 panels/modules which were allowed by GUVNL to be replaced. The alleged Information Memorandum is not binding and is not proof.

6.18. The Petitioner has stated replacement solar modules of different quantum in different communications dated 29.05.2020, 18.08.2020, 21.09.2020, 27.10.2020 and 10.12.2020.

The replacement of the panels was only to put the Petitioner in the same position as it would have been had the panels not been damaged. The Petitioner cannot claim higher CUF or higher generation on account of such replacement of panels.

6.19. The Respondent, GUVNL had on 28.03.2019 already informed the solar power developers not to replace panels without prior permission of

GUVNL. Despite the same, neither the Petitioner nor its Resolution Professional submitted any information to GUVNL. Further any new Applicants including the current management of the Petitioner were aware of the Letter dated 28.03.2019 written by GUVNL as this was prior to the Information Memorandum. In any case, the Petitioner cannot claim that it was not aware of the site or data prior to take over. The Petitioner has willingly taken over the project and it cannot simply shrug of the project's history. GUVNL cannot be made to suffer, nor consumer interest be ignored on such basis. The Petitioner company further cannot take the defense that the new management took control in May, 2020 and was therefore unaware of the damage caused to the site.

6.20. The alleged force majeure events took place in the year 2016/17. In terms of Article 8.1(c) of the PPA dated 09.12.2010 the affected party has to give notice of force majeure within 7 days. However, no such notice was received by GUVNL either within 7 days or thereafter. It is submitted that not only did the Petitioner not serve the notice within 7 days, in fact the said events were brought to GUVNL's notice 4 years later and even then no force majeure notice was issued. When the PPA requires something to be done in a particular manner, it has to be done in that manner. The Petitioner cannot claim relief of force majeure or any extension thereof without following the procedure provided in the PPA. The PPA uses the word "shall". The issuance of notice is therefore a mandatory requirement. Without such notice, there can be no claim made or granted for force majeure.

6.21. The Petitioner's claim for damaged modules is not only inconsistent but also based on reports, which are unverifiable. The Petitioner did not inform GUVNL at the relevant time of the damage occurred or of such reports stating that there had been damage to the Petitioner's plant.

When the verification was done by the team and the damage verified, GUVNL has given permission for replacement of panels. The Petitioner had been aware of GUVNL's policy with respect to physically verifying the damaged solar modules, yet it chose to scrap the modules, GUVNL without actual verification cannot permit the Petitioner to replace modules, as it may lead to capacity and/or CUF enhancement especially given the varying the stand in the Petitioner's claim of damaged panels. It was up to the Petitioner to ensure that the modules are available for inspection. The Petitioner cannot subsequently make excuses or justifications as to why the panels were not available for inspection. The Petitioner had invited GUVNL for inspection and was aware of the inspection team's visit. It should have ensured that the modules or panels are not removed before inspection.

6.22. The GUVNL cannot be held responsible for the Petitioner having already purchased the solar modules without seeking prior consent of GUVNL, especially because the Petitioner was aware of GUVNL's policy with respect to replacement of Solar Panels. The Petitioner had raised the issue only in May 2020 and had been in talks with GUVNL since then regarding replacement of panels. There is no reason for Petitioner to have purchased the new panels.

6.23. The responsibility to undertake repairs, operation, and maintenance, etc. is with the Petitioner. Such activities cannot be undertaken de hors the terms of the PPA, the Order dated 29.01.2010 of the Commission and contrary and prejudicial to consumer interest. The replacement of such modules has to be done in such a manner that the replaced modules do not exceed 54.83 KW in order to retain the same level of total power capacity of the system, and the total generation and thereby the CUF of the project does not increase or is contrary to the terms of the PPA or Tariff Order.

6.24. The cost of solar panel has significantly reduced with the passage of time as compared to those prevalent in the year 2010, when the tariff for the Petitioner's project was determined. Taking advantage of the same, it is apprehended that solar power generators may add additional solar panels or replace older panels with more efficient solar panels in their old power projects in order to generate more electricity and receive the higher tariff even though the costs associated with the said generation was much lower. If the said solar panels were installed in a separate power project, the tariff as on date available would be Rs. 2.00 per unit. Therefore, if the Petitioner were allowed to increase plant capacity and thereby CUF, then this would seriously prejudice consumer interest, as the Petitioner would be getting more tariff, while its cost of production would have gone down. The Petitioner cannot be benefitted at the cost of consumers.

6.25. The claim of the Petitioner in regard to physical possession or immovable properties are misconceived and irrelevant. The issue is related to the power purchase agreement and the Petitioner cannot on one hand claim the status of going concern, and on other hand ignore the past period and the requirements of the PPA. When the Petitioner claims that it was not in management in 2016, then the Petitioner cannot claim damage which had occurred in 2016 when it cannot be within its knowledge. There is no proof nor was any notice issued at such time to GUVNL by the Petitioner (as existing in 2016). The contention of the Petitioner is contrary to the data of generation from the Petitioner's project. Despite the alleged damage in 2016 and its non-maintenance since then, the generation is comparable to previous years.

6.26. It is reiterated that the Petitioner is not entitled to claim any extension of the first 12-year period of the PPA. Such a claim is baseless and

devoid of any merit. There is no such provision in the PPA for any extension during the term of the PPA even assuming but not admitting that there is any force majeure event. However, in any case, there is no force majeure event, the Petitioner has not provided any details of the alleged force majeure event, let alone provide any proof, there was no notice of force majeure as required under the PPA. Even otherwise, there was in fact no damage to panels as is clear from the generation data. Further admittedly, even as per the case of the Petitioner, the Petitioner had not sought to replace the panels/modules at such alleged time of damage.

7. During the pendency of the present Petition, the Commission passed an order dated 23.8.2022 in Review Petition No.1991 of 2021 in Daily Order dated 06.07.2021 as under:

ORDER

(i) The Petitioner is at liberty to carry out replacing/repairing work of Solar PV Panels at their own cost and risk and shall see to it that thereby there is no addition in capacity beyond the contracted capacity of 5 MW under the PPA. It is further clarified at the cost of repetition that this order shall not be construed as the final decision of the Commission of allowing the Petitioner's claim for repairing/replacing of 9510 Solar PV Panels, as the matter is pending for final decision."

6.3. In view of this, we further decide that the matter shall be kept for final hearing keeping the rights and contentions of both the parties open on all issues subject to the final decision in Petition No. 1948/2021. The issue of average annual CUF of the Petitioner plant wherein the Petitioner has requested for review of Order dated 06.07.2021 is also part of the issue need to be argued by the parties and final decision of the Commission is pending. Thus, Daily Order dated 06.07.2022 is not come in any way on the aforesaid subject matter.

6.4. The Daily Order dated 06.07.2021 passed by the Commission is an interim Order and not final decision. The parties have rights to make their submission on all issues including the issue of permissible CUF of the plant wherein their rights and contentions are open and the same are subject to final decision of the Commission in Petition No. 1948 of 2021.

7. This Review Petition is accordingly disposed of by correcting the impugned Daily Order to the above effect as prayed for in the Review Petition.”

ARGUMENTS OF THE PARTIES:

- 7.1. Heard learned Advocates for both the sides. Ld. Advocate Mr.Amit Kapoor for the Petitioner submitted that the petitioner has invested huge amount to acquire a sick industry and has also paid outstanding debts to creditors. The Petitioner is seeking to invest an additional amount to repair and replace defective solar panels in order to operate the project at full capacity. He claimed that the conditions being imposed by the Respondent are contrary to laws and previous tariff orders by the Commission. He referred to Order No. 02 of 2010 dated 29.01.2010 passed by the Commission and stated that the Order allowed for replacement of solar modules by a developer against the same Respondent GUVNL. He has referred to the Notice dated 28.03.2019 and other communications from GUVNL asking for prior permission for replacement of panels as some of the Solar Power Projects with whom the Respondent has Power Purchase Agreements had enhanced capacity of their Plants or were planning to enhance capacity of their Plants to get higher CUF after achieving the COD of their Projects, without the knowledge of the Respondent, which are in contravention of the Order/Tariff Order of the Commission.

- 7.2. It is submitted that both notices issued by GUVNL are contrary to the settled position of law, the PPA executed between the parties and the express rights conferred upon the Petitioner to operate its Project.
- 7.3. In terms of the PPA dated 09.10.2010, JPL is obligated to:-
- (a) Install RTUs to enable SLDC to monitor the injection of power
 - (b) Submit forecast for availability of power to SLDC
 - (c) The Petitioner is mandated to declare Availability/Declared Capacity of the Project to Gujarat SLDC and inject power strictly in terms of PPA.
 - (d) JPL is eligible to generate and inject and supply power upto the contracted capacity of 5 MW in any of the given months.
 - (e) The limitation in terms of PPA and order is that the Availability/Declared Capacity of the Project has never been more than 5 MW in any given months.
- 7.4. The replacement of solar modules is the prerogative of solar project developer and the buyer, viz. GUVNL is not entitled to restrain the generator from replacement of solar modules. It is unequivocal that there is no enhancement in the capacity of the project beyond the capacity certified by GEDA in the commissioning certificates dated 05.03.2012.
- 7.5. It is submitted that in terms of the Article 3.4, if the Petitioner committed an O&M Default other than due to Force Majeure Events, GUVNL shall give 90 days' notice to JPL calling upon JPL to remedy such default within 90 days.
- 7.6. In terms of Article 4.2 (ii), & 5.2, GUVNL is obligated to pay the fixed tariff as determined by the Commission in Tariff Order dated 29.01.2010 for the period of 25 years for all the scheduled

energy/energy injected by the Petitioner, as certified in the Monthly SEA by SLDC. Article 5.2 categorically stated that GUVNL shall pay the fixed tariff mentioned for 25 years for all the scheduled energy/energy injected as certified in the monthly SEA by SLDC. The tariff is determined by the Commission vide Tariff Order dated 29.01.2010 for solar based power project.

7.7. There was no written agreement or amendment of the PPA between the Petitioner and GUVNL which would have to necessarily follow the procedure prescribed in Article 12.8. He has referred to Tariff Order dated 29.01.2010 and submitted as under:

- (a) Selection of appropriate technology for the solar generating station is the discretion of solar project developers.
- (b) Generation does not fall within the category of licensed activity. Hence, there is no restriction on generation capacity to be installed by any project developer.
- (c) O&M expenses provided under the tariff consist of spares, employee cost, administrative and general expenses, repairs and maintenance, and insurance expenses.
- (d) Solar Power Projects shall be established with new Plants and Machinery.
- (e) Capacity Utilization Factor of SPV shall be 20%.

7.8. Based on the above, it is argued that the tariff for sale of power from JPL's Project is a generic levelized tariff determined by the Commission in its Solar Tariff Order dated 29.01.2010 on cost plus basis considering CUF of 20%, which is applicable to JPL's Project for a period of 25 years from the date of commissioning.

- 7.9. It is further argued that based on the normative factors, and detailed computations the Commission determined generic tariff of Rs. 15 per KWh for the initial 12 years, starting from date of commercial operation of the project, and Rs. 5 per KWh from the 13th year to the 25th years, for the Solar PV projects.
- 7.10. It is argued that there is no provision in PPA which allows GUVNL to restrict injection of power up to CUF of 14.34% or pay tariff for the power supplied by JPL considering CUF of 14.34%, when the Commission has determined the applicable tariff based on normative CUF of 20%. The Respondent has unilaterally considered an extraneous CUF of 14.34% as a ceiling which cannot be countenanced in fact and law. By doing so, GUVNL has acted in violation of the Solar Tariff Order which has attained finality and not challenged by GUVNL.
- 7.11. As per Resolution Professional report dated 25.05.2020, it was recognized that the Project was having around 9510 damaged/scrapped solar panels. Replacement of defective solar PV Panels is in accordance with Prudent Utility Practice and within the ambit of Operation and Maintenance of the Project which is the prerogative and obligation of JPL under the PPA and the regulatory framework. It is the obligation of JPL to keep the capacity of the Project at 5 MW during the entire duration of the PPA i.e., 25 years. The payment of tariff by GUVNL is not based upon CUF of the Project - rather, the tariff is paid based on actual generation from the Project in terms of the tariff determined by the Commission.
- 7.12. MNRE considering the sectoral issues being faced by the solar generators issued an Advisory/Clarification on 05.11.2019 clarifying that:

- (a) *Designing and installation of solar capacity on the DC side should be left to the discretion of the generator / developer.*
- (b) *As long as the solar PV power plant is in accordance with the contracted (AC) capacity and meets the range of energy supply based on Capacity Utilisation Factor requirements, the design and installation of solar capacity on the DC side should be left to the generator/developer.*
- (c) *Even if installed, (DC) capacity of Solar PV power plant is in excess of the value of the contracted (AC) capacity (MW). It is not in violation of the PPA as long as the:-*
- i. AC capacity of the solar PV power plant set up by the developer correspondences with the contracted AC Capacity; and*
 - ii. Power (MW) scheduled/supplied from the Solar PV power plant is not in excess of the contracted AC capacity.*
- (d) *As per law, setting up of generation capacity is an unlicensed activity. Therefore, any person is entitled to set up any capacity which he desires to sell power to any entity which may want to buy it.*

7.13. He has referred to the following in support of his arguments:

- i. Letter from Ministry of Union of India has been held to be statutory document having force of law as held in Energy Watchdog V. Central Electricity Regulatory Commission, (2017) 14 SCC 80.*
- ii. Judgement dated 16.11.2021 in Appeal No. 163 & 172 of 2020 titled Nisagra Renewable Energy Pvt. Ltd. V. MERC & Anr.*

7.14. In view of the above, he argued that it is prerogative of the developer to finalize the optimal DC capacity for its project in a manner that can deliver the contracted capacity and achieve the declared CUF. There is no restriction on the DC capacity to be set up or the maximum declared CUF. It is submitted that even if Respondent's allegation with respect to restriction of replacement of damaged and defective modules by the power producer limited to average CUF is accepted then it would amount to restrict the Project capacity of the Petitioner below than actual agreed in PPA and also in violation of the PPA and order of the Commission. It is also against the terms of MNRE clarification dated 05.11.2019 and Hon'ble APTEL Judgment dated 16.11.2021 in Appeal No.163 & 172 of 2020 titled Nisagra Renewable Energy Pvt. Ltd. V. MERC & Anr, since it is the prerogative of JPL to finalize the optimal DC capacity for its Project in a manner that can deliver the Contracted Capacity. Further, DC overloading is an accepted industry practice for solar projects. JPL never demanding to allow supply power over and above the Contracted Capacity to GUVNL, which is an admitted position.

7.15. The Petitioner has established the Project pursuant to Gujarat Solar Power Policy 2009. The tariff for sale of power from JPL's Project is a generic levelized tariff determined by the Commission in its Solar Tariff Order dated 29.01.2010 on cost plus basis which is applicable to JPL's Project for a period of 25 years from the date of commissioning, i.e., upto December 2035.

7.16. The Respondent has unilaterally considered an extraneous CUF of 14.34% as a ceiling which cannot be countenanced in fact and in law. By doing so, GUVNL has acted in violation of the Solar Tariff Order which has attained finality and not challenged by GUVNL. The only

restriction under the PPA is that the injection shall not exceed the contracted capacity of 40MW.

7.17. The tariff agreed under the PPA is based upon the generic levelized tariff determined by the Commission in Solar Tariff Order dated 29.01.2010. Hence, the PPA dated 9.12.2010 to the extent of the tariff provision is a Statutory Contract, which cannot be altered by GUVNL since the tariff agreed therein is a determination by the Commission in the exercise of its statutory powers which got incorporated in a mutual agreement between the parties. In this regard the Petitioner relied upon the following Judgements:

- i) GUVNL v. Solar-Semi-conductor Power Co. (India) Pvt. Ltd. (2017) 16 SCC 498.
- ii) GUVNL v. Tarini Infrastructure Ltd. (2016) 8 SCC 743.
- iii) Hon'ble APTEL Judgment in GUVNL Vs. GERC 2014 SCC Online APTEL 168
- iv) Hon'ble APTEL Judgment dated 23.04.2015 in Appeal No. 297 of 2013 titled GMR Gujarat Solar Power Pvt. Ltd. Vs. GERC & Anr.
- v) Hon'ble High Court of Andhra Pradesh Judgement dated 15.03.2022 passed in W.A. Nos. 383 of 2019 & Batch.

7.18. He further argued that it is a settled position of law that generic tariff order passed by the Electricity Regulatory Commission under Section 61 and 62 of the Electricity Act, 2003 based on normative parameters is not permissible to be re-visited and cannot be reopened. Once the generic tariff order is passed, the State Commission becomes functus officio and cannot review such tariff. To support its arguments the Petitioner has referred the following Judgements:

- i) Hon'ble APTEL Judgement dated 22.08.2014 in Appeal No. 279 of 2013 GUVNL V. GERC & Ors.

- ii) Fortune Five Hydel Projects Pvt. Ltd. Vs. KERC & Ors. 2019 SCC On Line APTEL 51.

7.19. When a statute confers power to do a particular act and has laid down the method in which the power has to be exercised, it necessarily prohibits the doing of such act in any other manner or by any other person. Hence, GUVNL has no authority whatsoever to: -

- a) Tamper with tariff (including CUF of 20%) determined by the Commission in exercise of its statutory powers and as agreed under the PPA; and
- b) Undertake functions specifically vested to a statutory body, i.e. this Commission;

7.20. In view of the above, he further argued that:-

- a) As per the PPA, JPL has the right to supply power upto the contracted capacity of 5 MW and receive the tariff in respect thereof as agreed under the PPA.
- b) There is no provision in PPA which allows GUVNL to restrict injection of power up to CUF of 14.34% or pay tariff for the power supplied by JPL considering CUF of 14.34%, when the Commission has determined the applicable tariff based on normative CUF of 20%.
- c) GUVNL computation of CUF as 14.34% belies all logic.
- d) The restriction on replacement of solar modules sought by GUVNL for the power supplied by the Petitioner based on an extraneous CUF, amounts to revision of tariff determination by the Commission and violates the sanctity of the PPA and the Tariff Order.
- e) GUVNL does not have the power or authority to step into the shoes of the Commission and decide/adjudicate upon any issue between GUVNL and the Petitioner JPL. The Respondent ought to have approached the Commission, if it was of the view that the Petitioner, has violated any contractual provision.

7.21. Under the PPA, the Petitioner has a right to receive tariff of Rs. 15/kWh for first 12 years and Rs. 5/kWh from 13th Year to 25th Year. This is a vested right in favor of the Petitioner, which cannot be taken away with retrospective effect. In this regard reliance is placed on Hon'ble Supreme Court Judgment in J.S.Yadav V. State of U.P. (2011) 6 SCC 570.

7.22. Once the generic tariff order dated 29.01.2010 determining the fixed tariff of Rs. 15/kWh for first 12 years and Rs. 5/kWh from 13th year to 25th year was passed:

- i. The Petitioner acted upon the same by establishing a 5 MW solar project in Gujarat and entered into a PPA with GUVNL for generation and sale of electricity.
- ii. The Petitioner's decision to invest in the State of Gujarat was directly linked to the levelized generic tariff determined in Order dated 29.01.2010 by the Commission.
- iii. The generic tariff determined by the Commission was incorporated into the PPA.

Therefore, the Petitioner has a legitimate expectation that the tariff determined by the Commission and incorporated in the PPA signed between the parties would be honoured.

7.23. It is argued that the restriction on replacement of solar modules to keep the plant capacity based on an extraneous CUF of 14.34% as a ceiling was never embodied in the PPA, or Tariff Order and is violative of the Petitioner's legitimate expectation besides being unfounded in terms of the PPA. In this regard the Petitioner relied upon the following Judgement:

- a. Hon'ble Supreme Court Judgment in Delhi Electricity Regulatory Commission Vs. BSES Yamuna Power Ltd. (2007) 3 SCC 33.

b. Hon'ble APTEL Judgment dated 28.01.2021 passed in Appeal No. 271 of 2019 titled Haryana Power Purchase Centre Vs. Haryana Electricity Regulatory Commission & Ors.

In view of the above, the Respondent has taken upon itself the competence of deciding the CUF of the Petitioner's project which is impermissible in view of the assurance meted out in the PPA and the Tariff Order wherein it is undisputed that the tariff for the Petitioner's project will be Rs. 15 per kWh for first 12 years and power can be injected by the Petitioner upto the contracted capacity of 5 MW without any restriction upto a particular CUF.

7.24. It is submitted that as per Resolution professional report dated 25.05.20, it was recognized that the project was having 9510 damaged and scrapped solar panels. The same Resolution plan has been approved by the NCLT under section 31 of the IBC. Therefore, it is submitted that the Respondents, GUVNL have no authority to review the decision of NCLT.

7.25. At the time of handing over control of the Project pursuant to IBC proceedings (as recorded in CIRP before NCLT Ahmedabad) 9510 solar modules of the Project were either damaged or became defective. The Petitioner decided to replace some of the defective modules with new modules and keep the plant capacity of 5 MW. These modules were to be replaced by the Petitioner at its own cost without any compensation from the Respondent or the insurance company.

7.26. The replacement was necessary for the Petitioner to comply with its contractual obligations and for servicing its debt obligation.

7.27. At the time of commissioning of the Project, a thin solar PV cell of 85 Watt of 58539 numbers were installed. On perusal of technical report,

it was found that 49029 solar PV cells were in running condition whereas 9510 Solar PV modules were defective/inactive and not generating power to meet the contracted capacity of 5MW as per the PPA. These Solar Panels and modules were damaged due to heavy cyclone and flood in that region in the year 2016 and 2017. The defective and damaged solar modules required to be replaced with a view to compensate the wattage lost due to lower capacity of plant, due to the damaged modules of the project.

7.28. Accordingly, some of the defective modules were removed from their mounting structures and new replacement PV modules were mounted on the same structures so freed-up.

7.29. It is a settled position of law that facts admitted need not be proved, as per Nagindas Ramdas v. Dalpatram Ichharam, (1974) 1 SCC 242 [Para 27] and Gautam Sarup v. Leela Jetly, (2008) 7 SCC 85.

7.30. With regards to replacement of under-performing and damaged solar PV modules of the Project, the following is noteworthy:-

In terms of the PPA dated 9.12.2010 :-

- i) Project means a Solar Photovoltaic Grid Interactive Power Station comprising of 5 numbers of units (invertors) and a total installed capacity of 5 MW.
- ii) The Petitioner shall construct, operate and maintain (O&M) the Project during the term of PPA at its cost and risk Article 4.1 (11). O&M activity includes replacement of damaged or affected (i.e., not functioning properly) parts and machinery of the Power Plant. O&M activity is carried out in every power plant (i.e., conventional or renewable). During the project life if any part or machinery of the project is damage or affected the generating

company is mandated to replace the same to achieve the desired availability, performance parameters and recover the agreed tariff.

- iii) The Petitioner shall operate and maintain the Project in accordance with Prudent Utility Practices Article 4.1 (vii).

MNRE by its Advisory/ Clarification dated 05.11.2019 has clarified that designing and installation of solar capacity on the DC side should be left to the discretion of the generator/ developer.

7.31. In view of the above, the following position emerges:-

- (a) There is no restriction under the PPA or the Tariff Order dated 29.01.2010 for replacement of defective Solar PV Panels. The Hon'ble Supreme Court in Assistant Collector of Central Excise Calcutta Division Vs. National Tobacco Company of India Limited, (1972) 2 SCC 560 held that the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for the performance of duty or where there is an express prohibition. It further holds that said rule is subservient to the basic principle that Courts must endeavor to ascertain the legislative intent and purpose, and then adopt the rule of construction, which effectuates, rather than one that may defeat the purpose. Hence, when there is no express prohibition/restriction in the PPA with regard to replacement of defective solar panels it cannot be said that the Petitioner is not permitted to undertake such replacement when the modules are found to be defective or damaged.
- (b) Definition of the Project does not include the total number of Solar PV Panels to be installed by JPL. Hence, installation of PV Panels

upto the Contracted Capacity of 5 MW is the discretion of the Petitioner.

- (c) The O&M expenses provided under the tariff payable to JPL includes the cost of spares and repairs & maintenance of the Solar Project. Thus, it is implied that repair/replacement of the equipment/machinery of the Solar Project is already envisaged by the Commission under the Tariff Order as a permissible exercise to be undertaken by the Project developer.
- (d) Hon'ble APTEL by its Judgment dated 11.11.2019 in Appeal No. 118 & 151 of 2016 in case of Welspun Renewables Energy Private Limited v. TNERG held that spares are an essential component for the efficient and continued operations of a solar generation plant, and the need for such spares cannot be dispensed.
- (e) Some of the defective solar PV Panels installed in the Project were needed to replace with new Solar PV Panels with a view to compensate the wattage lost due to accelerated degradation of such defective modules of the Project. Thus, the replacement of PV Panels carried out by the petitioner unequivocally falls within the ambit of operation and maintenance activity of the Project.
- (f) The defective panels have been replaced by new panels, which is in consonance with the mandate of Tariff Order dated 29.01.2010.

7.32. Replacement of defective solar PV Panels is in accordance with Prudent Utility Practice and within the ambit of Operation and Maintenance of the Project which is the prerogative and obligation of the petitioner under the PPA and the regulatory framework. In this regard, reliance is placed on the Commission's Order dated 03.11.2022 passed in Petition No. 1985 of 2021, Adani Power Ltd. v. GUVNL.

7.33. Neither any prior permission is required to be obtained from the Respondent nor the Petitioner is restricted under the PPA from undertaking such replacement activity for defective/damaged panels as long as the Petitioner supplies the contracted capacity in terms of the PPA to the Petitioner and such replacement does not enhance the installed capacity of the Project, which is not the case here. In terms of the PPA, the Respondent only has the right to procure solar energy from the Project upto 5 MW. GUVNL has no right to restrain the Petitioner from replacement of defective solar modules, invertors etc. since the same falls within the ambit of O&M of the Plant.

7.34. Under Sections 61 (h) and 86(1)(e) of the Electricity Act and Clause 5.12.1, 5.12.2 & 5.12.3 of the National Electricity Policy 2005, there is an express mandate on the Commission to promote generation from renewable energy and to gradually progress to satisfy energy demands by way of renewable energy sources. This position has also been affirmed by the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Ltd v. Solar Semiconductor Power Co. (India) Pvt. Ltd. reported as (2017) 16 SCC 498 [Para 31].

7.35. Contrary to the express mandate of the Electricity Act and NEP, if the Respondent is allowed to restrict the replacement of damaged and defective solar modules it will severely affect the viability of Petitioner Project, since the petitioner had already incurred such cost towards generating and supplying power to the Respondent. Hence, the Commission which has been vested with the responsibility to promote renewable sources of energy, ought not allow such arbitrary and unlawful claim of GUVNL.

ADDITIONAL PRAYER:

7.36. It is submitted that after filing of the present Petition, the Petitioner had connected the replaced/repaired panels to the grid in March 2022. Accordingly, on the basis of SLDC readings, the Petitioner raised the bills on GUVNL for the energy injected into the grid.

1. It is submitted that the bills raised by the Petitioner for the period from April 2022 to July 2022 were duly paid by GUVNL. However, from August 2022 onwards, GUVNL has been arbitrary and illegally deducting amounts from the Petitioner's bills to be paid, without assigning any reasons. The Petitioner has been submitting requests to GUVNL for release of deducted payments. However, GUVNL continues to illegally withhold the amounts to be paid to the Petitioner for the power generated by the Petitioner and supplied to GUVNL.
2. It is submitted that these developments were duly brought to the notice of the commission during the hearing held in the present Petition on 25.11.2022. The Petitioner respectfully submits that the above payments which have been arbitrarily and illegally put on hold by GUVNL should be directed to be released forthwith.

7.37. It is submitted that the Petitioner has also sought an extension of the tenure of the PPA due to the following:-

- (a) The cause of action started from the date of GUVNL's letter dated 28.03.2019. The new management of the Petitioner took over the on-going concern through the CIRP process on 19.03.2020 and the replacement of solar modules was done in March 2022.
- (b) As submitted earlier, the solar power project was damaged during 2016 and 2017, due to floods and cyclone. Thereafter, then the Petitioner went into IBC proceedings,

and after taking over the management, the same was intimated to the Respondent, GUVNL in May, 2020.

- (c) The above period during which the company was under CIRP process deserves to be excluded from the tenure of the PPA, and accordingly the said additional period from 19-03-2020, to March 2022, should be added to the total tenure of the PPA for the Project capacity which was not repaired and restored.

7.38. In view of the above, the Petitioner also seeks a declaration that the first-time block of 12 years of PPA be extended from May 2024 to May 2026 and the Petitioner be entitled to receive tariff of Rs. 15 kWh/unit towards the sale of energy to GUVNL.

7.39. The Petitioner's response to the Respondent, GUVNL's contentions:

- (a) CUF of a solar plant denotes the performance of such plant and is the ratio of actual output over the year to the maximum possible output from it for that year under ideal conditions, expressed in percentage. It is well established that CUF of a solar project cannot be uniform and varies depending on type of modules, solar irradiation, insolation, ambient conditions, solar radiation, angle of incidence, cable length, grid availability and number of sunny days etc., which are beyond the control of the generator.
- (b) Optimum O&M of the Project based on available-latest technologies (including proper cleaning, reducing AC-DC loss by proper size of cables in the plant, induction transformer loss and string level monitoring) may also result in optimum output increasing the CUF of the Project by 1.5% to 2%.

7.40. Over the past 10 years since commissioning of the Project, few Solar Modules were defective and damaged as per the report provided in NCLT proceedings. Their performance was below their warranty performance and were not performing. The generation data and peak performance for 5 years starting from the year of commissioning is reflective of the same. These defective modules were required to be replaced by the project developer with fresh modules. The low performance of plant due to defective modules, below the warranted performance, therefore the modules were replaced with additional cost to the developer with available technology modules. Resultantly, the Developer had to put in additional investment for the same. The replacement was necessary so that the Developer can service the debt taken for development of the plant. In order to maintain the designed performance of the plant, JPL had replaced such defective solar modules of MW by Poly-crystalline modules and thereby the Actual PR matched with the Designed PR.

7.41. If low performing/damaged modules are connected to an inverter along-with optimum performing modules, it brings down the performance of the optimum performing modules as well. Hence, why will JPL mix the two set of modules to its own peril and degrade the performance of the optimum performing modules.

7.42. Hence, such bald allegations of GUVNL based on assumptions and solely made with an intent to mislead Commission deserve to be rejected. It is a settled position that a Court of law shall not decide the claims made by the parties based on assumptions - rather decisions shall be based on legally acceptable evidence. Reliance is placed on:-

- i. Sham Singh V. The State of Haryana, (2018) 18 SCC 34 [Para 241]

- ii. Ratnagiri Nagar Parishad v. Gangaram Narayan (2020) 7 SCC 275 [Para 20];
- iii. Sree mutty Mohun Bibi v. Saral Chand Mitter, 1897 SCC OnLine Cal 135

7.43. GUVNL in its reply has made contradictory statements with regard to replacement of damaged / defective solar panels by the generating company.

7.44. On one hand GUVNL has contended that neither the PPA nor the Order/Regulations of the Commission permit replacement of damaged solar panels during the life of the Project while on the other hand GUVNL has contended that:-

- (a) There can be situation where the solar panels are physically damaged requiring the generator to undertake replacement in order to fulfil their obligations under the PPA;
- (b) Generator must seek prior permission of GUVNL before replacing any panel or making any modifications in the Project and replacement can be carried out after the permission is granted by GUVNL.

7.45. Further, GUVNL has also provided its guidelines for replacement of damaged solar panels during the life of the solar project. Thus, in effect GUVNL has admitted that generators can replace the defective/damaged solar panels if the conditions so warrant.

7.46. The guidelines for replacement of solar panels as referred by were never provided to JPL at any point in time said devised guidelines / protocols are unknown to the Law. The devised guidelines / protocols have no force of Law. The said guidelines / protocols are not available in public domain.

- 7.47. Unilaterally imposed guidelines /protocols are not part of PPA hence arbitrary, unjust and against the provision of contractual obligations and sanctity of PPA. The said guidelines neither approved by the GERC as a Regulatory Authority nor any public comments have been invited so far on the imposed devised guidelines / protocols. There is no provision in the PPA which allows Respondent GUVNL to unilaterally issue such devised guidelines / protocols and decide the methodology for the replacement of defective / inactive Solar PV modules and allied works that are part Projects O&M activity of Solar Power Plant which is a legitimate statutory right under the PPA to perform the operation and maintenance to operate the Solar Power Plant at its capacity of 5MW.
- 7.48. It is submitted that variation in Capacity Utilization Factors (CUF) of the Project (which may vary subject to the weather conditions) in any of the earlier years of operation of the project does not imply that the 5 MW power plant capacity is enhanced from its existing installed capacity.
- 7.49. It is the Petitioner's obligation to maintain and keep the Project capacity of 5 MW during the entire tenure of 25 years as per the terms of PPA. Therefore, the 9510 defective solar modules were replaced in accordance with the prudent utility practice and within the ambit of O&M of the project which is a prerogative and obligation of the Petitioner in terms of the PPA. If the petitioner would not have replaced the defective panels, it would have resulted in generation loss amounting to O&M default and violation of JPL's obligation to supply the contracted capacity of 5 MW. Accordingly, JPL complied with the prayer granted for the replacement of 9510 solar PV modules and informed the same to the Commission vide its letter dated 04.03.2022.
- 7.50. It is further submitted that the Petitioner has incurred an additional cost of Rs. 2.5 Crores to maintain the Project in proper working

condition by replacing damaged and defective 9510 solar modules and generate power as per the contracted capacity of 5 MW. This aforesaid amount of Rs. 2.5 Crores has never been claimed by the Petitioner from the Respondent since maintaining the Project is the Petitioner's obligation.

7.51. In view of the above, it is submitted that the Respondent has acted in violation of Electricity Act, Tariff Order of the Commission and overruled the provisions of PPA unilaterally and restricted the CUF at 17.5% instead of 20% as per the order of Commission. Additionally, terms such as Base CUF, Average CUF etc. are neither part of the PPA nor part of the Tariff Order and as such, ought not to be countenanced by the Commission.

8. Ld. Senior Advocate Shri M. G. Ramachandran on behalf of the Respondent argued according to the facts of the Petition and argued as under:

- i) During the hearing dated 25.11.2022, the Petitioner has raised additional issues which were not raised in any of the pleadings. The Petitioner is not entitled to argue any matter beyond the pleadings and the Respondent, Gujarat Urja Vikas Nigam Limited (hereinafter 'GUVNL') had objected to the additional issues being raised.
- ii) The Petitioner had established and commissioned its 5 MW solar power project on 27.01.2012. The Petitioner had procured Solar Modules, Panels etc., at the then prevalent cost for commissioning the said 5 MW plant. The installed capacity of 5 MW was also based on the technology and efficiency of the Solar Modules,

Panels, etc., then available which had the bearing of the quantum of generation.

- iii) The Tariff Order, 2010 itself clearly envisaged the progressive reduction in the cost of establishing the solar power project over the years.
- iv) The 5 MW project of the Petitioner was commissioned on 18.04.2012. On 09.05.2012 GEDA issued the Certificate of Commissioning. Thus, the solar power project had been commissioned based on the panels installed and inspected in 2012.
- v) As stated hereinabove the applicable tariff to the project of the Petitioner would be in terms of the Commission's 2010 Tariff Order dated 29.01.2010, the CUF for Solar PV projects was fixed at 20%. The above was fixed "considering the availability of Solar radiation, number of sunny days in the State of Gujarat and MoUs signed by several project developers in response to the GoG policy of 2009.
- vi) In the Order dated 29.01.2010 the Commission has noted that there is a declining trend in the cost of solar PV projects. Similarly, for the subsequent control periods the Commission had issued the Tariff Order, 2012 and the Tariff Order, 2015 determining the Tariff Terms and Conditions for the purchase of electricity by GUVNL from Solar Power Projects commissioned during the respective control periods. In the said Orders the Commission again recorded the trend of decrease in cost of establishing solar projects.

- vii) The significant reduction in the cost of PV modules, the research and development, the higher quantum of generation from the same installed capacity modules, etc., have been the salient features of the Solar PV Project's generation progressively since the establishment of 5 MW solar power project in January 2012. Over the period the capital cost and other operating cost of the Solar Modules have decreased very substantially resulting in significant reduction in per unit price of Solar Power.
- viii) It is evident that what was envisaged was routine maintenance and minor replacement of electronic components, and in no manner the wholesale replacement of the entire generating plant.
- ix) The capital cost for establishment of the solar project at that stage was much higher and the tariff as determined by the Commission was a promotional tariff considering the costs and parameters as then applicable. The capital cost for new panels to be installed at this stage is much lower and with much higher efficiency. In fact, the tariff for the new projects being established at present is only in the range of Rs. 2 to Rs. 2.50 per unit.
- x) The Operation and Maintenance expenses in the Tariff Order provides for the day-to-day maintenance and this cannot be construed to authorize any solar power developers to undertake replacement of solar panels, equipment or incurring of expenditure on capital aspect of enduring nature. Operation and maintenance expenses as defined by the Commission do not include cost of replacement of capital assets, these include 'spares, employee cost, administrative and general expenses, repairs and maintenance, and insurance expenses'. The cost of replacement of solar modules forms a part of the capital cost of the project, and thus the cost of replacement, i.e., capital cost,

cannot be considered as O&M expenses. The Commission in the 2010 Tariff Order has allocated only 0.5% of the capital cost for O&M expenses which shows clearly that O&M expenses were never meant to include capital expenditure towards replacement of modules.

- xi) The generators cannot be permitted to replace the solar panels with new panels with much higher efficiency and much lower cost, at be entitled to the same tariff as provided for in the PPA and determined by the Commission in the year 2012.
- xii) The tariff provided for in the PPA is based on the costs and expenses prevailing then and the efficiency of the solar panels as then available. The Petitioner in effect is seeking to divorce the tariff determination from the capital cost and efficiency of the panels, which is not permissible.
- xiii) It is submitted that substantial loss and prejudice that would be caused to the consumers at large if the Petitioner would seek the very high tariff based on historical capital costs, while virtually establishing a new plant at today's capital cost and efficiency.
- xiv) The Petitioner Company was revived by the current management, i.e. Parixit Irrigation Limited under the provisions of the IBC. The PPA dated 09.10.2012 continues to be in operation. In the Information Memorandum allegedly filed during the IBC proceedings on 20.04.2019 with the NLCT, Ahmedabad, providing details of the Petitioner's Project. The Petitioner only in the year 2020 informed GUVNL that as per the Information Memorandum dated 20.04.2019, 1.3 MW of the plant is damaged. In the said letter while referring to the Information Memorandum, the Petitioner itself admitted that the Petitioner is planning to install

1036 kWp capacity with 355/360 Wp solar modules and 2x500 kW inverter of ABB. This will increase capacity of plant to 5.5 MW.

- xv) The project was taken over by the new management in the insolvency proceedings, with full knowledge of the project, the rights and obligations of the parties and the terms of the PPA. The resolution applicant in fact proceeded to enter into the resolution process based on the tariff as available, the status of the project and on an as is where is basis. The Actual cost of acquisition to the present project promoter of the petitioner is significantly less. There is no justification for the consumers to pay a much higher tariff to the project, where the project is no permitted to replace the panels with new technology at a much lower cost. The Petitioner has sought to claim the plant was damaged in 2016-17 due to the cyclone and floods but at the relevant time had never apprised GUVNL of the same. In fact, the Petitioner had not even approached GUVNL after 28.03.2019 and it was only in day 2020 that the GUVNL was informed of any issue with panels.
- xvi) Article 8.1(c) of the PPA dated 09.12.2010 the affected party has to give notice of force majeure within 7 days. However, no such notice has been given by the Petitioner as it evident from the correspondence on record.
- xvii) The Petitioner did not serve the notice within 7 days, in fact the said events were brought to GUVNL's notice over 4 years later and even then, no force majeure notice was issued. It is submitted that when the PPA requires something to be done in a particular manner, It has to be done in that manner. The Petitioner cannot claim relief of force majeure or any extension thereof without following the procedure provided in the PPA.

xviii) The issuance of notice is therefore a mandatory requirement and without such notice, there can be no claim made or relief granted for force majeure. When the Contract requires a notice to be issued, such notice is required to be issued within the time frame provided and as per the requirement of the contract. In support of above arguments the Respondent has relied upon following Judgements.

a. The Central Commission in Order dated 27.06.2016 in Raichur Sholapur Transmission Company Limited -v- Power Grid Corporation of India Limited.

b. Talwandi Sabo Power Limited -v- Punjab State Power Corporation Limited and others. Appeal No. 97 of 2016 dated 03.06.2016 had considered the notice for synchronization to be mandatory and emphasized the use of the word “shall”.

xix) When the Petitioner did not even press or present its claim for force majeure, the question of now claiming that there was force majeure cyclone and floods in 2016-17 does not arise. The only inference for such claim not having been presented can be adverse to the Petitioner.

xx) The Respondent carried out site inspection of the Petitioner's project on 04.11.2020 which has reported as under:

a) In Segment No. 1 of the Project- only structures were found and no Solar PV Modules were mounted on such structures. Therefore, in the absence of any modules, the inspection team was unable to verify their status.

b) In Segment Nos. 2 to 5- 645 existing modules with capacity of 54.83 KW were found damaged. In pursuance to the

inspection, vide letter dated 12.11.2020 MGVL, wrote to GUVNL stating that in Segment No. 5 of the Petitioner's project 82 modules were found to be in good condition but they had not been connected.

- xxi) In view of the above inspection, GUVNL vide letter dated 10.12.2020, conveyed to the Petitioner that in terms of the inspection carried out on 04.11.2020, 645 existing modules with capacity of 54.83 KW were found to be damaged, and that the Petitioner was permitted to replace the same in a manner that the capacity of the replaced new modules does not exceed 54.83 KW and listed other conditions in terms of GUVNL's policy for replacement of solar panels.
- xxii) There is variance in the stand taken by the Petitioner in its various communications, with regards to solar modules proposed to be replaced by the Petitioner.
- xxiii) The stand of the Petitioner is inconsistent and is further based on reports conducted in 2019 and such damage was only conveyed to GUVNL on 29.05.2020. There is absolutely no justification for the same particularly when the Petitioner was well aware that any replacement of panels can be done only after GUVNL verifies the damage. If not, this would allow any generator to install cheaper, more efficient panels with higher capacity/CUF and still claim higher tariff as per PPA.
- xxiv) It is further submitted that the Petitioner has constantly undertaken that its plant capacity will not exceed 5 MW and that it shall abide by the terms of the PPA, and now it is seeking to negate the said undertaking, by attempting to increase plant capacity/CUF, and seeking to replace the solar modules without prior permission from GUVNL.

xxv) It is submitted that cost of solar panel has significantly reduced today since 2010, when the tariff was determined. Taking advantage of the same, some solar power generators had been adding additional solar panels or replacing older panels with more efficient solar panels in their old power projects in order to generate more electricity and receive the higher tariff even though the costs associated with the said generation was much lower. If the said solar panels were installed in a separate power project, the tariff as on date available would be Rs. 1.99 per unit Rs. 2.50 per unit. This is why the Generators are seeking to install in older plant so that higher tariff can be claimed.

xxvi) GUVNL allows for replacement of panels in case there is any damage to the project, when the generators may be permitted to carry out repair and maintenance work and replacement of solar modules and this is subject to prior permission as well as physical inspection being carried out by GUVNL, as stated above in Para 4.6.

xxvii) The Power project developers do not have an absolute and exclusive right to replace the damaged solar panels under law. This has been a consistent stand of GUVNL that the CUF after replacement of panels cannot be more than the Base CUF. This is the policy adopted by GUVNL while allowing the replacement of damaged solar panels which are otherwise not provided for in the PPA. While there may be genuine need to replace damaged panels, it is, however, not open to the generators replacing the solar panel etc. to increase the installed capacity of the solar power projects and thereby increase the quantum of generation over and above what they would have been able to generate considering contracted capacity as per the PPA and the consideration in the Tariff Order and take advantage of the higher tariff which is available under the PPA as compared to the current

market price of solar power. This is to ensure that the replacement is only for actual damage to the panels/modules.

- xxviii) GUVNL has adopted the above methodology for computing the quantum of generation to be considered when the solar modules or machines are replaced by Solar Power Developers by installing new modules based on the claim that the existing solar modules which were commissioned during the relevant control periods. The methodology was required to apply so as to balance the interest of generators who are required to replace the modules/machines on account of the same being not in a working condition and at the same time by adopting the said course of replacement the power developers do not increase the quantum of power generation and claim a higher tariff applicable.
- xxix) The Petitioner has been well aware that any replacement of panels can be done only after GUVNL verifies the damage. If not, this would allow any generator to install cheaper, more efficient panels with higher capacity/CUF and still claim higher tariff as per PPA.
- xxx) It is submitted that GUVNL has fairly dealt with the aspect when there is a genuine requirement to replace physically damaged Solar Panels and equipment. However, solar power developers including the Petitioner are responsible for prudent operation and maintenance of the Power Plant and cannot claim any adjustments from time to time arising out of lack of maintenance or imprudent practices. In any event, it is not open to the Solar Power Developers to increase the inherent capacity of the power plant to generate more quantum of electricity over and above what they would have been able to generate before. The Petitioner cannot be permitted to carry out replacement without considering factors of CUF and tariff also. The

question is not just of capacity. The Petitioner cannot claim the tariff as applicable for panels/modules commissioned in 2012 for panels/modules installed in 2020 or 2021. The PPA also recognizes that the tariff would be applicable as per date of commissioning. Further, not only the capital cost of the Solar Power Plant had declined considerably over the years but also there has been significant technological evolution and availability of higher efficient solar panels and other equipment with lower capital cost. These have resulted in a significant increase in the quantum of generation with the same name plate/ installed capacity of Solar Power Plant.

xxxii) Today's market price of modules does not justify making a payment at preferential in tariff allowed in 2010-2012, which was done with purpose of promoting solar projects. Allowing the SPDs to recover today's prices of solar panels, will amount to windfall gains to the agency and burden consumers of the state with higher electricity charges. Therefore, in any event, the Commission should allow only prevailing current prices of solar power for excess generation.

xxxiii) RE: MNRE Guidelines dated 05.11.2019: The Petitioner has relied on the said notification of the MNRE related to CUF applies to a competitive bid process where there are minimum and maximum generation prescribed.

- (i) The clarification was given in respect of the bidding where the CUF and the range of minimum and maximum generated quantum of electricity is provided for.
- (ii) In such cases the MW capacity to be installed, the design and specifications of the power plants etc., are left to the discretion of the developer/generator.
- (iii) In such situation there is no obligation on the procurer such as GUVNL to procure the quantum of electricity in excess of the

maximum quantum provided therein. In contrast if the quantum of electricity supplied tests than the minimum capacity the developer / generator is required to compensate the procurer for the shortfall in generations.

- (iv) Thus, the Petitioner is mixing up two different aspects. The MNRE notification deals with an entirely different aspect and is not applicable to facts and circumstances of the present case. In any case the Petitioner is wrongly relying on the Notification of 2019 for its past actions, which is otherwise also not permissible.

FINDING AND CONCLUSION:

9. We note that the present Petition has been filed by the Petitioner challenging the communication dated 28.03.2019 and 10.12.2020 of the Respondent whereby the Respondent has informed the Petitioner that the Petitioner would replace the solar PV modules limited to the conditions stated in the said letters and the CUF of the plant will not increase more than “Base CUF”. The Petitioner has challenged the said action of the Respondent and sought decision/directives of the Commission to decide and declare that the restriction put up by the Respondent against the replacement/installation of solar PV modules at its existing plant with a condition that the “CUF” of the plant will not more than “Base CUF” communicated by the Respondent vide its letter dated 10.12.2020 and 28.03.2019 is illegal, arbitrary and in contraventions of provisions of the PPA dated 9.12.2020 between the parties and is against the Order of the Commission.

9.1. The facts which are undisputed between the parties are as under:

- i) The Petitioner is having 5 MW solar PV power project.
- ii) The Power Purchase Agreement executed between the Petitioner and the Respondent on 9.12.2010. It was agreed between the

parties that the electricity generated from the solar power plant of the Petitioner be sold to the Respondent for entire life of the project i.e. for 25 years.

- iii) NCLT passed Order dated 2.11.2018 consequently CIRP initiated in respect to the Petitioner company.
- iv) Pursuant to Order passed by NCLT Ahmedabad in CP (IB) No. 172 of 2018 Committee of Creditors (CoC) formed and Resolution Professional (RP) appointed invited Expression of Interest (EoI) for submission of Resolution Plans (Bid) for Resolution of Petitioner company.
- v) On 20.04.2019 Resolution Professional prepared and issued the Information Memorandum pertaining to Petitioner company and invited Resolution from the interested Bidders.
- vi) The Petitioner company management namely Parikshit Irrigation Limited submitted Resolution Plan (Bid) in the bids invited by the Resolution Professional which was approved by the Committee of Creditors, (CoC).
- vii) NCLT has also approved Resolution Plan approved by Committee of Creditors under Section 31 of the Insolvency Bankruptcy Code 2016 vide its Order dated 19.03.2020.
- viii) The Respondent vide its letter dated 28.03.2019 informed the solar power project developers that some of the project developers have enhanced their plant capacity or planning to enhance capacity of the plant to get higher CUF after achieving the COD of the project without knowledge of the Respondent. It is also stated that if, any such irregularity is found in terms of capacity enhancement mechanism or CUF enhancement or change of panels after COD shall be considered as notice for termination of PPA and therefore, in such a case PPA shall be terminated without further notice.

- ix) The Petitioner vide its letter dated 29.05.2020, informed to the Respondent to allow repair and refurbishment of the damaged solar modules, inverters etc. of the solar power plant in order to have the installed capacity of 5 MW as per the terms of the PPA. It is also stated that neither panels nor inverters nor services for the same available on account of the product being obsolete.
- x) The Petitioner vide its letter dated 21.09.2020, informed the Respondent to allow the replacement of solar PV modules and inverters which were non-functional/damaged. In support of above the Petitioner has submitted the report of M/s. Chemtrols Solar Pvt. Ltd. Mumbai stating that around 1.2 MW solar power plant panels inverters were damaged and it requires replacement/repair. M/s. Chemtrols Solar Ltd. has shown total 9510 modules need to be repaired/replaced.
- xi) The Petitioner vide its email dated 09.10.2020 and letter dated 27.10.2020 informed the Respondent to inspect the plant and approved the repair work at the plant.
- xii) The official of the Respondent conducted plant visit of the Petitioner plant on 04.11.2020.
- xiii) The Respondent vide its letter dated 10.12.2020 informed the Petitioner that it is permitted to replace only 645 Nos. of damaged solar modules having capacity of only 54.83 kW. Further, certain other conditions are also imposed while granting the permission.
- xiv) The Petitioner vide letter dated 10.12.2020 informed that total 9510 number of modules were damaged at the Petitioner plant. The inspection team of the Respondent had not reported regarding inspection if any carried out in segment 1 of the plant where no solar modules installation done and only empty structure were seen without module. Further in segment 2 of the plant, 95 modules were not connected with the plant wherein Petitioner stated in segment 5 of plant 82 modules were not connected. Only

645 modules were found in segments of the plant whereas the survey in segment 2 to 5 of the solar power plant was not reported. Hence, the total module capacity of the plant damaged/defective is (i) segment 1, 808 kW (9510 solar modules) + (ii) segment 2 to 5 modules, 645 modules. Thus, defective/damaged modules or shortfall capacity of modules needs to install at plant having 5 MW capacity. By installation of the new modules in place of defective/damaged modules or disconnected modules the total capacity of the plant should not exceeded 5 MW in any case.

- xv) The Petitioner requested the Respondent for replacement of modules in September 2020. However, permission was granted in December 2020 with conditions.
- xvi) As per GEDA certificate/letter dated 5.03.2012, the plant was ready for commission on 27.01.2012. However, the same was commissioned on 18.04.2012.
- xvii) The Petitioner is eligible for receiving tariff as per Tariff Order No. 02 of 2010 dated 29.01.2010.
- xviii) The Respondent has permitted to replace 645 damaged modules as per inspection carried out on 4.11.2020. The capacity of replacement of modules agreed by the Respondent is 54.83 kW.
- xix) The Petitioner is eligible to keep capacity of the plant at 5 MW as per the terms of the agreement.
- xx) The Respondent vide its letter dated 28.03.2019 informed the solar project developers that it was apprehended that such developers were enhancing the plant capacity to take advantage of higher tariff provided in Order No. 02 of 2010 dated 29.01.2010 and Order No. 1 of 2012 dated 27.01.2012.
- xxi) The replacement of solar panels shall be allowed only to put up the Petitioner in the same position as it would have not been damaged.

- xxii) There were missing modules in segment 1 as they had been scrapped and were kept on side as scrapped.
- xxiii) The Petitioner raised the issue in May 2020 with the Respondent with regard to replacement of panels.
- xxiv) That according to the Respondent, once the commissioning certificate is issued by the GEDA, the generator cannot alter the capacity of the solar projects or the module panels based on which the project was commissioned.
- xxv) The Respondent has allowed for replacement of panels in case there is any damaged/defects in the solar panels/inverter of the solar plant of the Petitioner with prior permission as well as physical inspection being carried out by the Respondent.
- xxvi) The solar power plant was handed over by the Resolution Professional appointed under IBC proceedings to the Petitioner. In the proceedings of IBC, it is record about the damaged solar modules of 9510 numbers.

9.2. The disputed facts between the parties are as under:

- a) As per the Petitioner, 10,250 Nos. of 85-watt solar modules are to be replaced, whereas as per the Respondent only 645 solar modules having capacity of 54.83 kW are required to be replaced.
- b) Letter dated 28.03.2019/10.12.2020 of the Respondent requiring its prior approval for replacement of modules/inverters etc. of the solar power plant.
- c) Requirement of verification of damaged panels by the Respondent GUVNL and its approval.
- d) CUF of the solar power plant should not increase than the Base CUF i.e. average CUF of the power plant from the date of commissioning of the plant to the date of permission for replacement of modules/panels/inverters etc. allowed by the Respondent.

9.3. The Petitioner's plant was ready for generation/commissioning on 27.01.2012 as per the certificate issued by GEDA vide letter No. GEDA/Solar/Jaihind/2011-12/513 dated 9.05.2012. The same is reproduced below:

“

GEDA/SLR/RFG/2011-12/4367

Date: March 5, 2012

To,

M/s. Jaihind Projects Ltd.,

3rd Floor, Venus Atlantis Corporate Park,

Opp. Prahaladnagar AUDA Garden,

Anandnagar Road,

Satellite, Ahmedabad – 380015.

Subject: Readiness for generation of the Solar Power Plant.

Dear Sir,

With reference to the subject cited above, it is to inform that against the Power Purchase Agreement signed by you with GUVNL for the 5 MW Solar Power Plant, the 5 MW Solar Power Plant installed at Village: Chadiyana, Taluka: Santalpur District: Patan was ready for generation, but for the 66 kV transmission line, on 27th January, 2012.

Thanking You,

Yours faithfully,

Sd/-

S.B.Patil

Deputy Director”

.....

.....

Certificate No./ GEDA/Solar/Jaihind/2011-12/513 dated 9/5/2012 is reproduced below:

“Ref: GEDA/Solar/Jaihind/2011-12/513

Date: 09/05/2012

CERTIFICATE OF COMMISSIONING

This is to certify that M/s. Jaihind Projects Ltd., Corp. office at 3rd floor, Venus Atlantis Corporation Park, Opp. Prahaladnagar Auda Garden, Anandnagar Road, Satellite, Ahmedabad – 380015, have commissioned 5.00 MW (DC) capacity solar photovoltaic power project commissioning of new solar photovoltaic modules and inverters as per the details of date of commissioning give below.

Details of SPV modules and inverters:

Type of solar photovoltaic modules	: Thin Film
Make of Solar Photovoltaic modules	: QS Solar
Photovoltaic modules of 85 MW	: 58824 Nos.
Make of inverters	: Helios
Capacity of each inverters	: 1 MW & 1.25 MW
Total number of inverters of 1 MW	: 4 Nos.
Total number of inverters of 1.25 MW	: 1 Nos.
Total capacity of Solar Power Project	: 5.00 MW (DC)

Details of site location:

Village	Taluka	District	Revenue survey numbers
Chadiyana	Santalpur	Patan	134/1, 134/2, 135, 138, 140/1, 201

This 5.0 MW (DC) solar power project is connected to 66 kV project site sub-station. The project site sub-station is connected to 66 kV GETCO Bhadrada sub-station.

Details of Electricity generation for purpose of commissioning of the project:

No. of PV module (Nos.)	Capacity of module (W)	Capacity of project MW (DC)	Date of commissioning	Meter	Time (Hrs)		Meter (kWh)		Difference	MF	Net generation kWh
					From	To	Initial	Final			
58824	85	5.00	18/04/2012	1	13:05	14:45	23896.2	24034.7	138.5	30	4155
Total		5.00								Sub total	4155

.....”

This letter also shows that the 5 MW (DC) solar plant was connected to 66 KV project site S/S. The project site sub-station is connected to 66 KV GETCO Bhadrada S/S.

1. The type of solar PV modules are thin-film.
2. Photovoltaic modules capacity is 85 Watt.
3. Total No. of modules installed are 58824 Nos.
4. Inverter of Helios make and having capacity of 1 MW 4 nos. and 1.25 MW of 1 no.
5. Total capacity of plant is 5 MW DC.

9.4. The Petitioner and the Respondent have relied upon various provisions of the Power Purchase Agreement dated 9.12.2010 executed between the Petitioner and the Respondent and Order of the Commission dated 29.01.2010. It is necessary to refer to the same.

9.5. The relevant extract of Commission Tariff Order No. 02 of 2010 dated 29.01.2010 for Capacity Utilization Factor is extracted as under:

“ 4.10 Capacity Utilization Factor (CUF)

The energy generation for Solar Power project depends on solar radiation measured in kWh/ sq m/ day and number of clear sunny days. The output of Solar Cell is measured in terms of Wp (Watt Peak) and refers to nominal power under Standard Test Conditions (STC) (1000 W/m², 25°C, 1.5PM). The capacity utilization factor depends on site specific parameters like insolation & ambient conditions as well as the technology adopted for power generation, viz SPV or STP.

After considering the above aspects, the Commission had proposed CUF at 20% for SPV and 25% for STP.

Commission’s Ruling

The various objectors have suggested different capacity utilization factors for solar power project. Moreover, some of the objectors have suggested to consider CUF degradation of solar panel on annual basis. Some of the objectors have agreed that CUF considered by the Commission is correct. It is also possible to achieve higher CUF with track mode structure. The Commission also observes that a number of developers have agreed to the recommended rate of Solar Policy, 2009 of Govt. of Gujarat in which Govt of Gujarat has considered the CUF as 23% for solar PV and 25% for solar Thermal. The CERC has, in its order dated 3rd December, 2009 in suo-motu Petition No.284 of 2009 adopted normative CUF of 19% in case of grid connected Solar PV based Power projects. The Commission has received a Petition from M/s. Astonfield Solar (Gujarat)Pvt. Ltd. in which they have proposed the gross CUF at 23.96% and after deducting module loss, transmission loss and inverter efficiency, proposed a net CUF at 18.18%.

Considering the availability of Solar radiation, number of sunny days in the State of Gujarat and MoUs signed by several of Project developers in response to GoG Solar Policy, 2009 the Commission decides to retain the capacity utilization factor as 20% for SPV and 25% for STP projects.”

In the aforesaid decision, the Commission has considered that the CUF for the solar power projects is 20%.

- 9.6. The relevant extract of Commission Tariff Order for Duration of Tariff is as under:

“ 4.11 Duration of Tariff

The Commission considered the life of a Solar PV powerplant as 25 years and proposed that the tariff determined by this order be applicable for 25 years for the projects having Commercial Operation Date (COD) upto 31st December, 2011.

Commission’s Ruling

M/s. Essar Power Ltd. has not given any reasons for considering the project life of 30 years. Solar Power Technology is quite new and in a nascent stage. There is no adequate data available which specifies the project life of 30years. The CERC in its order dated 3rd December, 2009 in suo motu Petition No.284 of 2009 decided project life as 25 years. In view of above, the Commission decides to retain the project life as 25 years.

- i) The Commission has in its Order dated 29.01.2010 for determination of generic tariff for solar power projects decided the project life of the plant as 25 years.

9.7.The relevant extract of Commission Tariff Order for Parameter for determination of Tariff is 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:

Parameters for determination of tariff

	Parameter (per MW basis)	Solar PV Power Project	Solar Thermal Power Project
Project Cost			
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	<i>Return on Equity</i>	<i>14% p.a.</i>	<i>14% p.a.</i>
5	<i>Income-Tax for first 10 years</i>	<i>16.995%</i>	<i>16.995%</i>
6	<i>Income tax from 11th year onwards</i>	<i>33.99%</i>	<i>33.99%</i>
7	<i>O&M cost (% of the project cost)</i>	<i>0.5% of the capital cost (Rs. 8.25 lakhs) for the first year with escalation of 5% p.a.</i>	<i>1% of the capital cost (Rs. 13 lakhs) for the first year with escalation of 5% p.a.</i>
8	<i>Insurance Charges</i>	<i>0.35% of net asset</i>	<i>0.35% of net asset</i>
9	<i>Net CUF (at 100% grid & m/c availability)</i>	<i>20%</i>	<i>25%</i>
10	<i>Auxiliary consumption</i>	<i>Nil</i>	<i>10%</i>
11	<i>Actual machine availability</i>	<i>100%</i>	<i>100%</i>
12	<i>Actual grid availability</i>	<i>100%</i>	<i>100%</i>
13	<i>Project life (years)</i>	<i>25</i>	<i>25</i>
14	<i>Depreciation</i>	<i>6% for first 10 yrs. And 2% from 11th year onwards.</i>	<i>6% for first 10 yrs. And 2% from 11th year onwards.</i>
15	<i>Interest on working capital (i) Receivable of one month (ii) O&M expenses for one month</i>	<i>11.75%</i>	<i>11.75%</i>

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** perk Wh 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 or 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.”

In the aforesaid table the Commission has decided various parameters for determination of tariff for solar PV power projects wherein net CUF at 100% grid and machine availability is 20%. Based on it the Commission has determined the levelized tariff of Rs. 12.54 per unit for solar power projects set up under the control period of the said order and the same has been further bifurcated in 12 years and 13 years wherein the solar PV power projects eligible to receive Rs. 15 per unit for initial 12 years and Rs. 5 per unit for 13th to 25th year of operation of the plant.

9.8. The relevant extract of Commission Tariff Order for Control Period is as under:

“ 7.2 Control period

The Commission had proposed a control period for this order as the period from the date of final order of the Commission to 31.12.2011.

Suggestions of the Objectors

M/s Essar Power Ltd. has suggested that the control period should be kept 18 to 24 months for erection and commissioning of the plant to avoid any uncertainty for developer on the tariff after completion of the control period. It is suggested that the control period could be extended till March 2014. M/s Abengoa has suggested the control period be extended upto 31.12.2012.

Commission’s Ruling

It has been observed that the capital cost of the solar power project might reduce drastically as time elapses. However, since the gestation period for Solar PV projects is about 6 months and that for Solar Thermal Projects is 18-24months, the Commission decides that the control period for this order will be 2 years.

9.9. In the above decision the Commission has decided that the control period of the Order is 2 years.

9.10. The other provisions of PPA which are also relevant in this case are reproduced as under:

(i) O & M Default is defined as under:

1.1. **"O & M Default"** shall mean any default on the part of the Power Producer for a continuous period of ninety (90) days to (i) operate and/or (ii) maintain (in accordance with Prudent Utility Practices), the Project at all times.

The O & M default is defined as any default on part of the power producer for a continuous period of 90 days to operate and/or maintain the project with prudent utility practice is qualifies as O & M default.

(ii) Project is defined as under:-

"Project" means a Solar Photovoltaic Grid Interactive Power Station to be established by the Power Producer at Village Chadiyana Taluka- Santalpur, District Surendranagar in the State of Gujarat comprising of 80 numbers of units (inverters) with an individual installed capacity of 1.25 KW and a total installed capacity of 5 MW shall include land, buildings, plant, machinery, ancillary equipment, material, switch-gear, transformers, protection equipment and the like necessary to deliver the Electricity generated by the Project to the GUVNL at the Delivery Point".

The project is defined and agreed between the parties as solar photovoltaic grid interactive power station of 5 MW set up at village Chadiyana, Ta. Santalpur, Dist. Patan comprising of 80 Nos of its units (invertor) with individual installed capacity of 1.25 kW. It also includes land, building, and ancillary equipment materials, switchgear, transformers etc. to deliver the electricity generated by the project to the Respondent at the delivery point.

(iii) Prudent Utility Practices is defined as under:

“Prudent Utility Practices” means those practices, methods, techniques and standards, that are generally accepted for use in electric utility industries taking into account conditions in India, and commonly used in prudent electric utility engineering and operations to design, engineer, construct, test, operate and maintain equipment lawfully, safely, efficiently and economically as applicable to power stations of the size, service and type of the Project, and that generally conform to the manufacturers' operation and maintenance guidelines.

Prudent Utility Practice means the practices, methods, techniques, standards etc. accepted for use in electricity utility industries in India, and commonly used in electricity utility engineering, operation to design, engineer, construct, test, operate and maintain equipment lawfully, safely, efficient, economically, as applicable to the power station size, service and type of projects and generally confirmed to the manufacturer operation and guidelines.

9.11. Relevant Articles pertains to Obligations of Power Producer and GUVNL are as under:

“4.1 Obligations of Power Producer.....

- (i) *The Power Producer shall obtain all statutory approvals, clearances and permits necessary for the Project at his cost in addition to those Approvals as listed in Schedule 3.*
- (ii) *The Power Producer shall construct, operate, and maintain the Project during the term of PPA at his cost and risk including the Interconnection Facilities.*
- (iii) *The Power Producer shall sell all available capacity from identified Solar Photovoltaic Grid Interactive Power Plants to the extent of contracted capacity on first priority to GUVNL and not to sell to any third party.*
- (v) *.....The Power Producer shall also install RTUs to enable SLOC to monitor the injection of power.*
- (vii) *The Power Producer shall operate and maintain the Project in accordance with Prudent Utility Practices. Further, power producer shall submit forecast for availability of power to SLDC as per Regulation of Hon'ble GERC/CERC.*

4.2 Obligations of GUVNL

GUVNL agrees:

- (i) *To allow Power Producer to the extent possible to operate the Project as a base load-generating station.*
- (ii) *Pay to Power Producer for month energy bills for scheduled energy as certified by SLDC in SEA.”*

Article 4.1 of the PPA states “Obligation of the Power Producer” agreed between the parties. The said provision provides that it is an obligation of the power producer i.e. Petitioner to contract, operate and maintain the project during the terms of the PPA at his cost and risk including the interconnection facility.

9.12. The aforesaid Article provides that the power producer shall have an obligation to sell the energy generated from capacity of the plant to the extent of contracted capacity on first priority to the Respondent and not any third party.

9.13. Article 4.1 (vii) provides that the Petitioner, i.e. Power Producer, shall operate and maintain the project in accordance with the prudent utility practice. Further, it shall submit forecast for

availability of power to SLDC as per the Regulations notified by the Commission.

Article 4.2 of the PPA states obligations of the power procurer. It states that power procurer allows Power Producer to operate the project to the extent of based load station. It also states the power procurer to pay the power producer energy bills for scheduled energy as certified by SLDC in State Energy Account.

9.14. It is also necessary to refer Article 5 of the PPA extracted as under:

*“ARTICLE 5
RATES AND CHARGES*

5.1 Monthly Energy Charges; GUVNL 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 Photovoltaic project: Rs. 15 / KWh for First 12 years
and thereafter
Rs. 5 / 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, whichever is lower.”

9.15. Article 5.1 provides that the Respondent shall pay to the Petitioner every month energy charge for schedule energy / energy injected as certified in monthly State Energy Account issued by the SLDC at the rate specified in Article 5.2 of the PPA.

9.16. Article 4.2 (ii) read with Article 5.2, provides that the Respondent is obliged to pay the fixed tariff of Rs. 15 per kWh for first 12 years and Rs. 5 per kWh from 13th year to 25th year as per the Commission Order dated 29.01.2010 for all scheduled energy with energy injected by the Petitioner as per the State Energy Account issued by the SLDC.

9.17. Article 5.2 of the PPA states that the Respondent shall pay the fixed tariff stated in the said clause for 25 years for all the schedule energy / energy injected as certified in the monthly State Energy Account issued by the SLDC. The Respondent, GUVNL agreed to pay the tariff at the rate determined by the Commission in its Order dated 29.01.2010. The rate for solar PV project is Rs. 15 per kWh for first 12 years and thereafter Rs. 5 per kWh from 13th to 25th year. The aforesaid tariff is applied for the projects commissioned on or before 31.12.2011. Respondent GUNVL shall pay the tariff determined by the Commission for the solar projects which are commissioned after aforesaid date at a tariff stated above or the new tariff determined by the Commission whichever is lower.

9.18. It is undisputed that the Solar Power Plant ownership and management control acquired by the Petitioner through NCLT proceedings. It is necessary to refer the Information Memorandum (IM) published by Resolution Professional appointed by NCLT wherein the details of information provided which the Resolution Professional deemed relevant to the committee state as under:

.....

“Other Information, which the resolution professional deems relevant to the committee 5MW Solar Power Plant at Radhanpur, Gujarat.

.....

About Solar Power Plant:

- *The solar power plants located at survey No. 134/PL, 134/P2, 135, 138, 140.201 at Chadivana Village. Taluica-Sami, District-Patan, 385360, with the capacity of 5 MW.*
- *The solar power plant project was executed in 2011 and the commercial production has been started on last 2012 with full load capacity.*
- *This solar power plant has been made from the Thin Film Solar Cell, and is spread 43.74 acres land area with 58539 nos. panels of 85 Wp capacity had installed to generate the 5 MW with 5 Nos. of 1 MW inverters.*
- *The Tariff Rate under the PPA between the M/s. Gujarat Urja Vikas Nigam Limited and M/s. Jaihind Projects Ltd. as follows.*
- *Rs.15/KWh for First 12years.*
- *Rs. 5/KWh from the 13th year to 25th year.*
- *The solar irradiance is most important parameter for the solar power plant and plant has 5930 Wh/m²/day average.*

Current Scenario of Solar Plant:

- *Out of 58539 Panels, 49029 panels are in running conditions, 4690 Panels have cracks/Damage and balance 4820 panels were scraped.*
- *Plant is running on 80% capacity of their installed capacity, i.e. 4.1 MW out of 5 MW.*
- *Power Generation of Jan'2019 was 551286 units of average of 17783 units per day, Previous 12 months data shows an average revenue generation of approx. Rs. 70-80 Lacs per month.*

Operational Expense:

- *The operational cost of Solar Power Plant is approx. INR 8-9 Lacs per month. This plant is making profit approx.. 60-70 Lacs per month.*
- *There are two main part of operational expense for the plant.*
 - *Salary*
 - *Maintenance*

9.19. In the aforesaid information it is stated that current scenario of the plant wherein out of 58539 panels 49029 panels are running

condition, 4690 panels have cracks/damaged, and 4820 panels were scrapped. It is also stated that plant is running in 80% capacity of their installed capacity i.e. 4.1 MW out of 5 MW.

9.21 Thus, the Information Memorandum issued by the Resolution Professional formulated by Parthiv Parikh (Resolution Professional) recognised the aforesaid details in the Information Memorandum published.

9.22 In the Order dated 19.3.2020, the NCLT decided that the Resolution Professional has handed over the Asset “AS IS WHERE IS, WHAT IS, THAT IS, WHERE IS, THERE IS” basis in terms of NCLT Order dated 19.03.2020. Thus, the handing over of the asset by Resolution Professional (RP) is made to the Petitioner on 22nd May 2020 in aforesaid terms.

9.23 It is also necessary to refer recital to of ‘Annexure A’ which is part of the handing over taking over documents is reproduced below.

“WHEREAS the solar Power Plant is located at Survey No. 134/1, 134/P2, 135, 138, 140, 201, at Chadiyana Village. Taluka-Sami. District-Patan. Gujarat-385360 admeasuring to 43.74 acres of open land.

WHEREAS both the Party of the First Part Parties noticed that Solar power plant has been made from the "Thin Film Solar Cell, with 58539 nos. panels of 85Wp capacity had installed to generate the 5MW with 5 Nos. of 1MW inverters with. Solar irradiance as 5930Wh / m² /day average. It was further noticed that Out of 58539 Panels, 49029 panels are in running conditions. 4690 Panels have cracks / Damage and balance 4820 panels were scrapped. The Plant is running at around 80% capacity of their Installed capacity, i.e. less than 4.1MW out of 5MW.....”

9.24 From the aforesaid recitals following inferences are drawn:

- i. The Solar Power Plant has been made from thin film solar cells.
- ii. The total number of solar panels were 58539 Nos. of 85-watt capacity installed at the plant.
- iii. There are 5 Nos. of 1 MW inverters with the solar irradiation as 5930 Wh/m² per day average.
- iv. Further, noticed that out of 58539 nos. of panels 49029 panels are in running conditions.
- v. 4690 panels have cracks/damage and balance 4820 panels were scrapped.
- vi. The plant is running at around 80% capacity of the installed capacity i.e. less than 4.1 MW out of 5 MW.

9.25 From the above, it is clear that while the handing over made to the Petitioner after completion of IBC proceedings under the IBC Act 2016 by Resolution Professional on March 2020 total 9510 panels (4690 + 4820) panels were recorded as damaged and scrapped at the plant. Thus, only 49029 panels were operational and functional at the site recorded in the documents of handing/taking over of the plant by the Resolution Professional to the Petitioner under the IBC proceedings in aforesaid case before the NCLT Ahmedabad under Section 31 of the IBC Act, 2016.

9.26 The capacity of solar modules functional on the date of handing over taking over between the parties as per provision under IBC proceedings was of 49029 nos. with 85 watt capacity. Thus, the capacity of the modules functional at plant works out to 4.167 MW on the date of handing over taking over between the parties out of 5 MW capacity.

9.27 The Petitioner submitted that it has no access to the physical data or data of the company except the Information Memorandum (IM) published by the Resolution Professional appointed by the NCLT. It seems valid because the handing over taking over of the plant was made only in May 2020 through NCLT to the Petitioner after the Order passed by the NCLT Ahmedabad and the same is recorded in earlier para of this Order.

9.28 The Respondent has contended that the Petitioner has taken different stands with regard to replacement of solar modules on a ground that they are damaged from time to time. The Petitioner has stated the replacement of different number of modules and capacity in different correspondences. The Petitioner has demanded replacement of 10250 modules of 871 kilowatt, while the technical report submitted by the Petitioner of M/s. Chemtrols Solar Pvt. Ltd. state as 10437 modules and as per Resolution Profession (RP) Report of 9510 modules. The inspection report carried out by the Respondent through its inspection team on 04.11.2020 and they have submitted their report of the Petitioner plant specifying stating 645 number of the Respondent modules as defective modules and its capacity as 54.83 kW capacity.

9.29 As per the submissions of the Petitioner the defective solar modules are total nos. of 10,250 (9510 in segment 1 of the plant + 645 modules in segment 2 to 5 as per the GUVNL report + 95 modules missed out during site inspection by GUVNL). While the Respondent has stated in its site visit report dated 4.11.2020 that 645 existing modules are found defective in segment 2 to 5 of the plant.

9.30 As it is dispute between the parties with regards to solar modules found defective/damaged at the Petitioner plant and it requires to replace by the Petitioner to maintain the power plant capacity of 5 MW as agreed between the parties, it is necessary to considered the submissions made by the parties which are relevant in this case to arrive at conclusion are stated below:

1. As per PPA dated 9.12.2010 the plant capacity is 5 MW.
2. As per GEDA commissioning certificate dated 5.03.2012 readwith 9.05.2012 plant having total 58824 solar modules of 85 Wp capacity at the plant.
3. The commissioning date of the plant as per the GEDA certificate dated 27.01.2012.
4. The CIRP proceedings under IBC Act, 2016 initiated against the company before NCLT Ahmedabad in CP No. (IB 172) of 2018, wherein Resolution Professional was appointed by the NCLT. The Resolution Professional issued Information Memorandum based on information upto 28.04.2019.
5. The said Information Memorandum states that out of 58539 panels at plant 49029 panels are in running condition and 4690 panels have been either cracked/damaged and balanced 4820 panels were scrapped. Thus, total 9510 panels are either cracked, damaged or scrapped. It is also stated that plant is running on 80% of installed capacity.
6. In the Order in IA No. 593 of 2019 in CP (IB) no. 172 of 2018 NCLT, Ahmedabad has recorded that fresh fund for Capex for Solar Power Project has advised by the Resolution Professional (RP) 250 lakhs be required out of total aggregate amount of Rs. 5804.58 lakhs as application of funds. Thus, an amount of Rs. 250 lakhs be envisaged in power plant by Resolution Professional for revival of the Plant.

7. The deed of confirmation for handing over physical possession of the plant made on 25.05.2020 between the Resolution Professional of the Petitioner plant under CIRP proceedings and the present Petitioner who has acquire the plant under IBC proceedings under IBC Act, 2016. The recital of Annexure 1 of the said document also recognized that out of 58539 nos. of solar panels of 85 Wp capacity total 49029 panels are in running condition, 4690 panels have cracks/damage and balanced 4820 panels were scrapped.
8. The site visit on 24.09.2019 and 25.09.2019 done by the private consultant appeared by the Petitioner company of total damaged modules in segment 1 as 9510 nos. While in segment 2 to 6 of the plant damaged modules are 927 nos. However, there is no details with regard to which are modules found damaged in which row etc. stated.
9. The GUVNL staff who have visited on 4.11.2020 have recorded that there are defective modules found in different row of segment 2 to segment 5 of the plant. The total damaged modules found as 644 nos, as per letter dated 12.11.2020 having capacity of 85 Wp. Thus, total capacity of defective modules is 54.84 kW. It is also recorded that in segment 5 disconnected PV modules found as 82 No. The capacity of solar module capacity in that segment was of 0.47 MW out of it 82 modules of 85 Wp found disconnected having capacity of 6970 Wp. It is also recorded in report dated 4.11.2020 by the Respondent representative that in segment 1 of the plant only structure for Solar modules found bout no modules fixed on it.

9.31 We note that prior to inspection carried out by GUVNL on 4.11.2020 the power plant of the Petitioner was handed over by the Resolution Professional to the Petitioner on 25.05.2020 under

Section 31 of the Insolvency Bankrupt Code Act, 2016 wherein it is specifically stated that total 9510 nos. (8690 + 4820) of solar modules are found as either cracked/damaged or scrapped out of total 58539 solar modules installed at the plant. Thus, the effective modules in operation are 49029 nos. only on 25.05.2020.

9.32 We also note that Resolution Professional CRP has issued the Information Memorandum of the plant and handed over the plant to the Petitioner on "As and where Basis" on 25.05.2020 wherein it is categorically stated that 9510 solar panels are either defective cracked or scrapped. Personnel of the Respondent have also recorded regarding the status of the Solar modules installation at the plant in segment 1 condition where there is no modules/panels are there when the representative of the Respondent visited. Hence, the contention of the Respondent who is silent on submission of the Petitioner, RP Information Memorandum and handing over the plant agreement between RP and Petitioner have categorically recorded that 9510 number of solar modules/panels were damaged/cracked/scrapped in segment 1 during the hearing as well as in the inspection report of the staff of the Respondent categorically admitted that in segment 1 of the plant only structures are found and no modules, were found installed. We are therefore of the view that the claim of the Petitioner that 9510 nos. of solar modules of segment one (1) of the plant are damaged/cracked, scrapped seems valid. The claim of the Petitioner with regard to above no. of modules damaged/cracked, scrapped is correct and we approved the same. The contention of the Respondent is required to be rejected.

9.33 Now, we deal with issue with regard to the number of modules which are stated as damaged by the Petitioner as 740 in segment

2 to 5/6 of the plant wherein the Respondent has stated the same no. is 645 only. The Petitioner has stated that in segment 2, 95 no. of modules where damaged/not available is not recorded by the representative of GUVNL is a dispute between the parties. We note that the Respondent itself has stated that as per inspection report of the staff of the Respondent on 4.11.2020 (i.e. after the possession of the plant from RP received by the Petitioner on 25.05.2020) recognized that 644 no. of modules in different segment row of the Petitioner plant were damaged/defective. Hence, the same no. of modules which are part of segment 2 to 5 of the Petitioner plant is also genuinely defective or damaged wherein there is no dispute on it between the parties. The representative of the Respondent also recorded in there visit of the Petitioner power plants that 82 solar modules in segment 5 are disconnected in the plant. Hence, as per the inspection report of the Respondent the total solar modules either damaged/defective or not connected with the plant works out to $644 + 82$, i.e. 726 Nos.

9.34 Now, we deal with the defective modules/damaged modules which are not available in the said plant as per the submission of the Petitioner as they are disconnected in the plant stated as 95 Nos. while as per the above submission it is 82 nos. of the modules were not connected with grid as submitted by the Representative of the Respondent. We note that the report of 4.11.2020 prepared by the representative of GUVNL states that 82 Nos. of solar modules panels were disconnected in the plant in segment 5. Thus, the above statement specifies that 82 number of solar modules found to be either defective or non-functional or for any other reason not connected with Petitioner's plant in segment 5 of the plant. Hence, we are of the view that the claim of the Petitioner

with regard to modules which are defective in addition to 644 modules in segment 2 to 5 of the Petitioner plant is valid while 82 Nos. of solar modules in segment 5 of the plant where it was found the said solar modules are not connected with plant and found disconnected is also needs to considered while replacement of solar modules eligible by the Petitioner.

9.35 Considering the above, we are of view that the new solar module/panels qualify for replacement or install at the Petitioner plant were $9510 + 644 + 82$ modules worked out to 10436 modules. The capacity of non-available solar plant capacity works out to $10436 \times 85 \text{ Wp} = 887.060 \text{ kW}$

9.36 Now, we deal with the issue raised by the Respondent that after replacement of solar PV modules, inverter etc. the CUF of the plant shall be limited to the "Base CUF" or the same may be permissible upto the agreed terms of the PPA as disputed by the Petitioner. The Respondent has also contended that replacement of modules by the Petitioner is not permissible and against the provision of PPA as well as orders of the Commission. The defective/damaged modules or inverters or other part of the plant be permitted replaced only with permission of the Respondent. It is also contended that after replacement of the modules, inverters etc. the CUF of the solar power plant should not be increased more than Base CUF. In case the CUF is more than Base CUF the Respondent is not liable to pay any amount for such incremental CUF. In support of aforesaid contention, the Respondent has relied on Orders of the Commission dated 29.01.2010, and provisions of PPA. Further, it relied on the communication dated 10.12.2020 and submitted as under:

1. The capital cost of the PV modules reduced drastically and resulting in reduction in tariff of Solar energy supplied to the licensee by the generator.
2. Significant technology evolution in availability of higher efficiency of solar panels etc.

9.37 Per contra, the Petitioner argued that the contentions of the Respondent with regard to the Base CUF is permissible for the rest life of the PPA period and the Petitioner is not eligible the tariff/revenue for the generation above Base CUF after replacement of defective modules, inverter etc. is not correct, legal and valid. It is also against the provisions of Power Purchase Agreement executed between the parties and tariff Orders of the Commission in this regard.

9.38 The Petitioner has also contended that the Respondent is not eligible to re-write the contract/agreement and add, amend, alter the agreement unilaterally. The Respondent is also not eligible to restrain the Petitioner from the replacement of defective, damaged, solar modules inverters etc. of the plant. The restriction put up by the Respondent with regards to replacement of the damaged/defective modules by the Petitioner who is power producer limited to average CUF achieved by the plant which is quite below actual agreed CUF in the PPA is in violation of provisions of the PPA. It is also against the terms of the MNRE clarification dated 5.11.2019 and Hon'ble APTEL judgement dated 16.11.2021 in Appeal No. 163 and 171 of 2020 Nisarga Renewable Energy Pvt. Ltd. Vs. MNRE and Others wherein Hon'ble Tribunal has decided that it is the prerogative of the Juniper Pvt. Ltd. (JPL) to finalise the optimal DC capacity for its project in a manner that can deliver the contracted capacity and achieve the declared capacity. DC overloading is an accepted industries practice for

solar projects. The Petitioner has never been demanding to allow supply of power above the contracted capacity with Respondent.

9.39 The Petitioner also contended that the Respondent has unilaterally considered extraneous CUF of 14.34% as a ceiling which cannot be countenanced in facts and in law. The aforesaid Act of the Respondent is in violation of the Order No. 02 of 2010 dated 29.01.2010 of the Commission. The said Order of the Commission is in generic nature and the Respondent is not entitled to revisit and re-write the said Order. In support of above submissions the Petitioner has relied upon following decisions which we have gone through:

- 1) GUVNL Vs. Solar Semiconductor Power Company (India) Pvt. Ltd. 2017 (16) SCC 498.
- 2) GUVNL Vs. Tarini Infrastructure Ltd. 2016 (8) SCC 743.
- 3) GUVNL Vs. GERC - 2014 SCC Online (APTEL) 168.
- 4) Hon'ble APTEL Judgement in Appeal No. 297 of 2013, GMR Gujarat Solar Pvt. Ltd. Vs. GERC and Others.
- 5) Hon'ble High Court of Andhra Pradesh Judgement dated 15.03.2022 in W.A. No. 383 of 2019 and batch matters.
- 6) Hon'ble APTEL judgement dated 22.08.2014 in Appeal No. 279 of 2013, GUVNL Vs. GERC and others.
- 7) Hon'ble APTEL judgement dated 29.03. 2019 in Appeal No. 42 of 2018, Fortune five hydel projects Pvt. Ltd. Vs. KERC and others reported 2019 SCC online APTEL 51.

9.40 The Petitioner also contended that the vested rights provided in PPA in favor of the Petitioner cannot be taken away with retrospective effect by the Respondent. The rights to receive tariff of Rs. 15/kWh for first 12 year and Rs. 5/kWh from 13th year to 25th year provided in the PPA for energy supplied from the

Petitioner plant. The aforesaid tariff is agreed to provide by the Respondent based on the generic tariff Order No. 02 of 2010 dated 29.01.2010. The decision taken by the Petitioner for investment in the project with consideration of levelized generic tariff determined by the Commission. Hence, the Petitioner has legitimate expectations that the tariff determined by the Commission and incorporated in the PPA executed between the parties would be honored. In support of above, the Petitioner relied upon the decision of Hon'ble Supreme Court in J.S.Yadav Vs. State of U.P. (2011) 6 SCC 570.

9.41 We note that, there is dispute between the parties with regard to the CUF of the plant eligible to achieve and operate by the Petitioner after replacement of the defective damaged solar modules/inverters and accordingly the revenue for supply of energy permissible to the Petitioner in terms of PPA between the parties. The Respondent contended that the Petitioner is not eligible any CUF beyond Base CUF i.e. average CUF of the plant from the COD of the plant to till the replacement of the modules etc. On the contrary, the Petitioner submitted that the restriction put up by the Respondent is not legal and valid. The Petitioner is eligible to achieve the CUF of 20% as per the PPA terms read with Commission Order No. 02 of 2010 dated 29.01.2010. The Petitioner has also argued that the restriction put up by the Respondent is illegal and arbitrary and deserved to be quashed and set aside.

9.42 We note that as stated above, the Petitioner plant was ready to commission on 27.01.2012. The tariff eligible by the Petitioner plant is as per order No. 02 of 2010 dated 29.01.2010 of the Commission. In the said Order in para 5 the Commission has

considered the various technical and commercial parameters including CUF stated below:

1. The selection of appropriate technology for generation of electricity from the plant of at its discretion of solar project developers.
2. The capital cost of the solar PV project is 16.50 Cr.
3. O & M cost 0.5% of Capital Cost (Rs. 8.25 lakhs) for the 1st year with escalation of 5% per annum.
4. Insurance Charge 0.35% of net asset.
5. Net CUF (at 100% grid at machine m/c availability) of 20%.
6. Project life of 25 years.

9.43 Based on above, the levelized tariff for solar PV power generation with discounting rate of 10.19% works out to Rs. 12.54 per kWh.

9.44 Based on levelized tariff of Rs. 12.54/unit the tariff determined for solar PV project at Rs. 15 per kWh for initial 13 years from the date of commissioning of the project and Rs. 5 per kWh from 13th year to 25th year by the Commission in the aforesaid Order.

9.45 The Commission has in the said Order decided that tariff rate shall be applicable for purchase of solar power generation by the distribution licensee and other utilities for compliance with renewable purchase obligation specified by the Commission.

9.46 In the said Order the Commission has considered that the CUF of the plant shall be remain 25 years constant of 20%. It is also decided that the life of the plant is 25 years. Further, the solar project developer have been granted O & M cost to carryout O & M activities on regular basis to maintain the plant. The tariff

eligible by the solar PV developer for initial 12 years at the rate of 15 per kWh and Rs. 5 per kWh from 13th to 25th year.

9.47 On combined reading aforesaid provisions, the following inferences are drawn:

1. The installed capacity of the plant shall be equal to 5 MW.
2. In terms of Article 3.4 of the PPA, if Petitioner commits an O&M default other than due to force majeure event the Respondent shall give 90 days notice to the Petitioner calling upon to remedy such default within 90 days, the PPA shall stand terminated as per Article 9 of the PPA.
3. Article 4.1 of the PPA states regarding obligation of the power producer (Petitioner) that it shall construct, operate and maintain the plant during the terms of the PPA at its risk. The Petitioner shall sell all available capacity from the plant to the Respondent on first priority basis.
4. Article 5.2 of the PPA as referred above states that, it was agreed between the parties that the Respondent GUVNL shall pay the fixed tariff of Rs. 15 per kWh for first 12 years and thereafter Rs. 5 per kWh from 13th year to 25th year. The aforesaid tariff eligible by the Petitioner for all scheduled energy injected as per the certified monthly State Energy Account issued by SLDC.
5. For any amendment in the PPA both parties have to agree on it and it cannot be amended unilaterally.

9.48 Considering the above, we are of the view that the Petitioner who is solar PV power project developer is eligible to generate the electricity from its plant capacity limited to 5 MW in terms of PPA and supply the electricity up to 20% of CUF as per the Order No.

02 of 2010 dated 29.01.2010 read with PPA executed between the parties during the period of PPA of 25 years. The restriction put up by the Respondent vide letter/notice dated 5.11.2019 is against the decision of the Commission in Order No. 02 of 2010 dated 29.01.2010 read with the provision of the PPA and Order of Hon'ble APTEL in Appeal No. 279 of 2013 in GUVNL Vs. GERC and others. The relevant portion of the said Order is reproduced below:

“131.

Therefore, the generic tariff order on normative parameters is not permissible to be re-visited on the basis of the actual cost incurred especially when the Tariff Order, 2010 did not reserve with itself the power to re-visit if the actual parameters applied by the Generators vary with the normative parameters.....

177. Summary of our Findings

(3) The State Commission has correctly rejected the Petition of the Appellant for re-determination of tariff as not maintainable due to following:

(d) Generic Tariff Order on normative parameters is not permissible to be re-visited on the basis of the actual cost incurred in setting-up the Project and actual equity deployed.”

9.49 Further, we note that the rights vested in favor of any party in terms of Order no. 02 of 2010 dated 29.01.2010 and in terms of the Articles of the PPA, with regard to tariff cannot be taken away with retrospective effect by the Respondent. We note that while passing the Order No. 02 of 2010 dated 29.01.2010 the Commission has specifically considered the CUF of the solar PV power plant as 25 years constant at the 20%. Further, it is also held by the Commission that the levelized tariff for the energy generated and injected into the grid from solar PV power plant worked out as Rs. 12.54 per unit. The Commission has determined the generic tariff for electricity from solar PV plant at

rate Rs. 15 per kWh for initial 12 years starting from the date of commercial operation of the project and Rs. 5 per kWh from 13th year to 25th year which are the terms between the parties.

9.50 The Petitioner has submitted that 9510 number of solar modules of segment 1 of the plant either damaged/cracked or scraped. Moreover, 645 nos. of solar modules found damaged in segment No. 2 to 5 and 82 solar modules of segment 5 are not connected in plant found by the representative of the Respondent during their visit of plant. Hence, the capacity of plant become lower than 5 MW. Thus, the plant is operating during the operation of the Project at lower capacity installed during their visit of plant. The Petitioner underperforming significantly below desired performance levels. As a result, generation of power from the Project had been severely affected. The Original Equipment Manufacturer of the solar modules of 85 Wp are not available. Hence, in order to prevent further deterioration in generation from the Project and to comply with the obligation under the PPA to supply the Contracted Capacity to the Respondent, the Petitioner decided to replace some of the defective modules with new modules from a different capacity available in the market. These modules were replaced by the Petitioner at its own cost without any compensation from the Respondent or the insurance company as agreed during IBC proceedings before NCLT, Ahmedabad.

9.51 We observe that in terms of the PPA and Tariff Order dated 29.01.2010, the Petitioner being the generating company is

responsible for constructing, operating and maintaining the 5 MW Solar Project for the entire duration of 25 years in accordance with Prudent Utility Practices and at its cost and risk. O&M activity is carried out in every power plant (i.e., conventional or renewable) and it includes activities pertaining to replacement of damaged or affected parts and machinery of the Power Plant. During the project life, if any part or machinery of the project is damaged or defective become non-functional and its performance is affected, the Petitioner being the generating company is mandated to replace the damaged/defective part of the plant to achieve the desired availability and performance parameters of the power plant. Further, the O&M expenses provided under the tariff payable to the Petitioner includes the cost of spares and repairs & maintenance of the Solar Power Project include replacement of damaged parts/equipment.

9.52 In Tariff Order dated 29.01.2010 passed by the commission, it is held that selection of appropriate technology for the solar generating station is the discretion of solar project developers and generation does not fall within the category of licensed activity. Hence, there is no restriction on generation capacity to be installed by any project developer. The relevant portion of the said order is reproduced below:-

“3...The Commission has decided that selection of appropriate technology should be left to the discretion of solar project developers and hence, has adopted an approach of Generic Tariff determination.

Commission’s Ruling

4.2.....generation does not fall within the category of licensed activity. There is no restriction on generation capacity to be installed by any project developer. Hence, such a provision is against the spirit of the Electricity Act, 2003”

9.53 The Project as defined in the PPA executed between the Petitioner and the Respondent provides as Solar Photovoltaic Grid Interactive Power Station comprising of 6 numbers of units (invertors) with an individual installed capacity of 500 KW of 2 Nos. and 1 MW capacity of 4 Nos., total installed capacity of 5 MW. This definition of the Project does not include the total number of Solar PV Panels of appropriate authority to be installed by the Petitioner. Hence, there is no restriction under the PPA or the Tariff Order dated 29.01.2010 for repair/replacement of the equipment/machinery including replacement of defective or damaged Solar PV Panels by the generating company during the tenure of the PPA.

9.54 The defective panels if any have been replaced by the Petitioner with new panels, which is in consonance with Tariff Order dated 29.01.2010. We are of the view that replacement of defective solar PV Panels carried out by the Petitioner to compensate the wattage lost due to damaged/cracked or defective modules is in accordance with Prudent Utility Practice and within the ambit of Operation and Maintenance of the Project which is the prerogative and obligation of the Petitioner under the Act and PPA and the regulatory

framework. Hence, permission from the Respondent is not required to carry out such replacement activity so long as the Petitioner supplies the energy generated from contracted capacity in terms of the PPA to the Respondent.

9.55 Further, we note that the Petitioner relying upon MNRE by its Advisory/Clarification dated 05.11.2019 has clarified that designing and installation of solar capacity on the DC side should be left to the discretion of the generator/developer. Further, the Hon'ble Appellant Tribunal in its recent judgment dated 16.11.2021 in Appeal Nos. 163 & 171 of 2020 *Nisagra Renewable Energy Private Limited v. MERC & Anr* taking note of the MNRE's Clarification has held that it is the prerogative of the developer to finalize the optimal DC capacity for its project in a manner that can deliver the contracted capacity and achieve the declared CUF. There is no restriction on the DC capacity to be set up or the maximum declared CUF. DC overloading is accepted as an industry practice for Solar Projects. The same is reproduced below:-

“30. It appears that the compensation for Change in Law has been limited based on the ratio of the declared CUF under the PPA to the minimum CUF of 19% by applying a simplistic linear formula based on normative parameters to arbitrarily calculate the DC capacity it having been overlooked that it is the prerogative of the developer to finalize the optimal DC capacity for its Project.

31.....As pointed out by the appellants there is no finding returned that the higher DC capacity or higher CUF in relation to the projects in hand is imprudent.

33. Juniper has installed DC capacity of 43.72 MW (146%- or 1.457-times overloading) and Nisagra set up its projects with DC capacity of 101.79 MW (145%- or 1.454-times

overloading). As against the minimum CUF of 19%, declared CUF is 25.16%, 24.92% and 25.29% in the case of Juniper and at 25.40%, 25.00%, 25.66%, 25.37%, 25.15%, 25.69% and 25.05% in the case of Nisagra. The appellants have only exercised the right given by RfS and PPA to design their projects in a manner that can deliver the Contracted Capacity and achieve declared CUF. In this view, we find nothing remiss when it is asserted by the appellants that the projects were accordingly set up and it was declared that CUF in the range of 24.9%-25.7% would be offered.

34.... We hold, on the given facts, that once the RfS and PPA have been approved by the Commission and the declared CUF has been accepted by the parties and the Commission, it (the Declared CUF) cannot be questioned.

35.... The said order having attained finality, the MERC was expected to consider determination of compensation on actual DC installed capacity. By the impugned order, the Commission has limited the compensation by restricting the project DC capacity to 39.67 MW as against the total DC capacity of 43.72 MW for Juniper and to 93.33 MW as against the total DC capacity of 101.79 MW for Nisagra. Such an approach is contrary to the terms of the PPAs as well as settled law on the subject, particularly because it is based on normative/arbitrary formula different from the actuals.

36. In our view, under the PPAs, there is no restriction on the DC capacity to be set up or the maximum declared CUF. The CUF as declared by the appellants has been accepted by MSEDCL..... DC overloading is accepted as an industry practice for Solar Projects. MSEDCL has already taken the benefit of higher generation at a lower tariff. MSEDCL cannot claim that DC overloading is high. Accordingly, there is no escape from the full DC capacity of the Projects being considered while computing the Change in Law compensation.”

9.56 The reliance of the Petitioner on MNRE Advisory / clarification dated 05.11.2019 is not applicable in the present case as the same is advisory / guideline while the PPA executed between the parties and agreed tariff in it based on the order dated 29.01.2010 of the Commission do not state

about overloading of the Power Plant capacity by installation of solar PV panel above contractual capacity nor PPA also state the same. Moreover, it is advisory and guideline. Hence, we are of the view that the reliance of the Petitioner on MNRE guidelines is not applicable in this case. Similarly, the reliance of the Petitioner on the judgement of the Hon'ble APTEL dated 16.11.2021 in Appeal No. 163 and 171 of 2020 is also not applicable in this case as the facts of the case in the Appeal and present case are different and distinct. Moreover, the PPA executed between the parties also do not provide for overloading of DC capacity of Solar PV Power Plant.

9.57 We have gone through the provisions of the PPA as well as our Tariff Order and we find nothing therein to state that if the generating company replace any damaged panels/modules after commissioning of the solar project then the tariff will be revised to that extent in terms of the tariff order applicable during such period. We are of the considered view that tariff is determined considering the investment made by the generating company at the relevant point in time. The Petitioner had made investment for setting up the 5 MW Project during the control period of Tariff Order dated 29.01.2010. Hence, tariff for 5 MW shall be paid by the Respondent in terms of the tariff determined in Order dated 29.01.2010 and as agreed under the PPA.

9.58 We note that the Petitioner's obligation to supply power to the Respondent and the Respondent's obligation to pay tariff in

respect of such power is embodied in the PPA entered between the parties. In terms of Article 4.1(iii) of the PPA, the Petitioner is obligated to sell all available Capacity from the Project to the extent of Contracted Capacity, i.e., 5 MW on first priority basis to the Respondent and not to sell to any third party:

“4.1 Obligations of Power Producer.....

(iii) The Power Producer shall sell all available capacity from identified Solar Photovoltaic Grid Interactive Power Plants to the extent of contracted capacity on first priority to the Respondent and not to sell to any third party.....”

9.59 Similarly, in terms of Article 4.2(ii) and 5.2 of the PPA, the Respondent is obliged to pay the fixed tariff as determined by the Commission in Tariff Order dated 29.01.2010 (i.e. Rs. 15/kWh for first 12 years and Rs. 5/kWh from 13th year to 25th year) for the period of 25 years for all the Scheduled Energy/Energy injected by the Petitioner, as certified in the monthly SEA by SLDC:

*“4.2 Obligations of the Respondent
the Respondent agrees:*

(ii) Pay to Power Producer for month energy bills for scheduled energy as certified by SLDC in SEA.

.....

5.2 the Respondent 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 Rs. 15 / KWh for First 12 years and
Photovoltaic thereafter
project: Rs. 5 / KWh from 13th Year to 25th
Year.”*

9.60 From the aforesaid contractual provision, we note that it is the Petitioner's obligation to keep the capacity of the Project at 5 MW during the entire tenure of the PPA i.e., 25 years. Thus, if the Petitioner would not have replaced the defective panels it would have resulted in generation loss amounting to O&M Default and violation of the Petitioner's obligation to supply the contracted capacity of 5 MW.

9.61 The Respondent has also contended that there is replacement of modules by the Petitioner which is not permissible and against the provision of PPA as well as orders of the Commission. In support of aforesaid contention, the Respondent has relied on Orders of the Commission dated 29.01.2010, 27.01.2010, 08.08.2013, 15.08.2015 and submitted as under:

1. The capital cost of the PV modules reduced drastically and resulting in reduction in tariff of Solar energy supplied to the licensee by the generator.
2. Significant technology evolution in availability of higher efficiency of solar panels etc.

9.62 It is a fact that the tariff determined by the Commission from time to time reflects the cost of solar PV modules and other equipment. Moreover, the Commission has also considered different aspects while determining the tariff from solar energy projects from time to time. The reduction in tariff from

2010 to 2016-17 and onwards is due to reduction in cost of the plant, efficient utilization of the plant, reduction in losses in the plant etc. However, it is not a ground that the project developer should be restrained from the replacement of damaged /defective PV modules existing at its plant. Contrary to it, it is the duty of the plant owner to keep the plant in good conditions and supply the energy as agreed between the parties. Failure to adhere the aforesaid conditions is an event of O & M default on the part of the project developer in terms of the PPA. Neither the PPA between the parties nor the Order of the Commission provides that prior approval/permission of the distribution licensee is required by the generators for replacement/repair of any equipment of the plant including solar modules if any. The Petitioner who is generating company and executed the PPA for supply of solar power from 5 MW capacity of the plant to the Respondent GUVNL is eligible to keep the capacity of the Plant of 5 MW and generate and supply the electricity from the plant having CUF of 20% per annum basis to the Respondent and recover the revenue from supply of energy. Hence, the contention of the Respondent that the Petitioner trying to recover higher amount by way of excess generation by replacing modules is not acceptable as no excess capacity of the modules desired to keep at the Petitioner plant, which affect the total capacity of the plant.

- 9.63 The Respondent has submitted that there is no provision in the Power Purchase Agreements or Orders or Regulations of this Commission which allows the Petitioner to replace

damaged solar panels during the life of the Project without prior permission of the Respondent. In its reply dated 14.09.2021 the Respondent has provided its guidelines for replacement of damaged solar panels during the life of the Project indicating that the replacement of panels undertaken by the Petitioner is not in line with the Respondent guidelines.

9.64 Now we deal with issue with regards to verification of the modules installed by the Petitioner after replacement with consideration of proceedings before the NCLT, Ahmedabad and verification by the Respondent at Petitioner Plant be in accordance with the approved modules replacement, inverter replacement, requires commissioning certificate by GEDA for assumption that the nos. of solar PV modules and inverters and its capacity shall be in accordance with the Order of the Commission by the Nodal agency, GEDA who has issued original Commissioning certificate of the Solar PV Power Plant of the Petitioner.

9.65 We also note that the original modules installed were 58539 panels/modules at the Petitioner Plant which is recognized by the GEDA in its certificate for commissioning of the Petitioner power plant whereby the GEDA has recorded that the total 58539 number of modules were installed at the Petitioner plant of 85 Wp on date of Commissioning i.e. 27.01.2012. The Respondent raised the issue that the number of the solar PV module inverters etc. replaced by the Petitioner and quantum of it be needs to verify and certify by

nodal agency GEDA. Hence, the replace modules by the Respondent also require to verify and certify by the GEDA who is nodal agency for certification. We therefore decide and direct that the Respondent with its official and GEDA verify, installed and replaced solar modules at Petitioner plant and certify that number of modules replaced by the Petitioner with consideration capacity of the replaced modules as approved in this Order not to exceed in any case more than 870.060 KW. The Petitioner is also directed to provide the details of replaced modules number, its make, its capacity and technical details etc. specifying the plant segment, Row etc. to the Respondent and GEDA representative with RFID number of replaced solar modules etc. The Respondent with tis personal verify the same along with GEDA representative and issue certificate of Commissioning of number of solar modules. The same be also provided on record of this Petition by the Respondent and GEDA so that in future whenever any dispute arise between the parties with regard to capacity of plant replaced solar modules in place of original installed modules at the time of commissioning of the plant etc. be remain on record and also ensure that the capacity of plant must be not exceed than 5 MW and corresponding generation is limited only to 5 MW as per the terms of the agreement dated 09.12.2010 executed between the parties.

9.66 Now we deal with the relief sought by the Petitioner with regard to issuance of order/direction extending time block for 12 years contended in Article 5.2 of the PPA till the date, modules are replaced and solar PV plant is fully operational

with 5 MW capacity for the delay caused by the Respondent. The Petitioner has made following arguments in support of above.

9.67 The Petitioner has contended that the solar panels of the Petitioner plant were damaged due to Cyclone and Flood during the Period FY-2016-2017 in the said area and it affected generation of the plant by reducing the total capacity of the solar modules for generation of the electricity from the plant. The solar modules damaged/cracked due to Cyclone/Flood that is about 9510 modules having capacity of 85 Wp which had also been recognized in the CIRP proceedings before the NCLT, Ahmedabad. Further it is also argued by the Petitioner that the Respondent has restrained the Petitioner from carrying out work for replacement of the modules etc., through the Petitioner having rights to carry out the same as per the terms of the PPA. Hence, the damaged modules replacement restrained to the Petition which are due to cyclone/flood as well as permission sought by the Petitioner not granted by the Respondent be consider as force majeure and accordingly the term of the PPA may be allowed to extend. The period of extension of time block of 12 years till date of modules are replaced and the plant is fully operationalized with 5 MW capacity to be decided and permitted.

1. Per contra the Respondent, GUVNL has vehemently objected the said contention of the Petitioner stating the following objections:

- a) The incident stated by the Petitioner with regard to Cyclone/Flood etc. at the plant is not qualified for force majeure event.
- b) There is no notice which is mandatory under the force majeure conditions specified and agreed between the parties, under Article 8 of the PPA issued by the Petitioner.
- c) The issue of force majeure for extension of time period of 12 years of tariff determined and decided by the Commission in its order No. 2 of 2010 dated 29.01.2010 and agreed between the parties in article 5.2 of the PPA is not permissible to be extended.
- d) The contention of the force majeure raised by the Petitioner first time after 3 years from the occurrence of the incidence in 2016-17 is not permissible.

9.68 We note that the Petitioner has raised the issue of force majeure event occurred in this case with regard to occurrence of cyclone/flood in the area of Petitioner Power plant which led to damage to the solar modules, inverters and equipment installed at the Petitioner power Plant. The Petitioner has stated that this event occurred during FY-16-17. With consideration of argument advanced by the parties following facts/inference are drawn:

- A) The incidence stated by the Petitioner was of FY-16-17, however there is no document on record specifying that when such incidence was occurred.

- B) There are no details on record specifying that due to cyclone/flood what number of modules were damaged/cracked or required to be scrapped.
- C) There are no details with regard to any insurance claimed by the Petitioner that what is claimed for aforesaid incident and out of that claim how much modules inverters and other parts of the plant if any replacement for the same was granted by the insurance company and value was granted.
- D) There is no material on record as regards the original design of the plant consist of different factor of safety with and regards to cyclone structure rain fall water logging if any occurred etc..
- E) What action had been taken by the petitioner for informing the Respondent that occurrence of cyclone/flood affected the power plant of the Petitioner.
- F) That the replacement of defective/damaged modules, invertors etc. has been awaited by the Petitioner till date of first notice issued by the Respondent as a prudent O&M practice and awaited permission of the Respondent first and thereafter such approval of the Respondent.
- G) No details of actions taken by the Petitioner.

9.69 It is also necessary to refer to the provision of force majeure agreed between the parties in PPA dated 09.12.2010 in terms of Article 8 of the PPA. The same is reproduced below.

*ARTICLE 8
FORCE MAJEURE*

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, including 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 their respective obligations under this Agreement);
- (v) inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;
- (vi) earthquakes, explosions, accidents, landslides; fire;
- (vi) expropriation and/or compulsory acquisition of the Project in whole or in part by Government Instrumentality;
- (vii) 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.

(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, equipment, materials, spares parts or consumables for the project;
 2. Delay in performance of any contractor / sub contractor or their agents.
 3. Non performance resulting from normal wear and tear experience in power generation materials and equipment Strike or Labour Disturbances at the facilities of affected parties
1. In efficiency of finances or funds or the agreement becoming onerous to perform, and

2. *Non performance caused by, or concerned with, the affected party's'*
I. *Negligent and intentional acts, errors or omissions; Failure to comply with Indian law or Indian Directive; or Breach of, or default under this agreement or any Project agreement or Government agreement.*

(c)The affected Party shall give notice to other party of any event of Force Majeure as soon as reasonably practicable, but not later than 7 days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If any event of Force Majeure results in a break down of communication rendering it not reasonable to give notice within the applicable time limit specified herein, then the party claiming Force Majeure shall give notice as soon as reasonably practicable after reinstatement of communication, but not later than one day after such reinstatement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed, and the Affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other party may reasonably request about the situation.

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

“.....8.2 Available Relief for a Force Majeure Event:

No Party shall be breach of its obligations pursuant to this agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure event. For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under this Agreement shall be suspended or excused due to the occurrence of a Force Majeure Event in respect of such Party....”

Article 8.2 of the PPA states that, in case of force majeure event, if any occurred, in that case, no penalty shall be

considered for breach of its obligation pursuant to the agreement to the extent of performance of its obligations was prevented, hindered or delayed. It also stated that neither party shall be under obligation of make payment of money due and payable prior to occurrence of force majeure event shall be suspended due force majeure event. This clause states only “non-breach” of the obligations in the event of force majeure event, if any occurred. The said clause does not say that period of agreement be extended.

9.70 Article 9.1 of the PPA also necessary to refer read as under:

“9.1 Terms of Agreement:

This agreement shall become effective upon the execution and delivery thereof by the parties hereto and unless terminated pursuant to other provisions of the agreement, shall continue to be in force for such time until completion of a period of 25 years (Twenty Five) from the Commercial Operation Date.”

As per said Article, the period of the PPA shall be from the date of sign of Agreement to 25 years i.e. 09.12.2010 to 09.12.2035 only. There is no provision for extension in the completion period in the PPA.

9.71 As per the aforesaid Article of the PPA, following actions are required to be taken by the project/power producer on the occurrence of the force majeure event:

a) Issuance of force majeure notice by the concerned party i.e. power producer of power plant who seeks invocation of force majeure event specified in Article 8 of the PPA to the

Respondent GUVNL, who is the power procurer, within 7 days from the date of occurrence of the incident.

- b) The Petitioner has not provided any details of the cyclone if any occurred in the plant site with weather data recording instrument if any provided at project site or any authority data specifying details of cyclone intensity, date, time. Similarly, no details of flood in the power plant which is recorded and notified by any authority of that area with supporting data, figure etc. specifying details of flood etc.
- c) On receipt of the force majeure event Notice the power procurer shall have right to visit the plant and verify the fact stated by the Power producer in notice and respond on the notice of the occurrence of force majeure events claimed by the Power producers.
- d) In case of any dispute between the parties with regard to force majeure events, if any occurred, the aggrieved party has right to approach the Commission with regard to dispute between the parties on force majeure event.

9.72 With consideration of the aforesaid aspects and the provision of Article 8 of the PPA and documents/evidences put up on record of this Petition we observed and following conclusion is derived:

- a) The Petitioner has not issued any notice as stipulated in Article 8 (c) of the PPA agreed between the parties after occurrence of force majeure events and deprived the right of the Respondent for inspection of the plant etc. to verify the occurrence of the force majeure event and its impact on the equipment of the plant.

b) Merely stating that cyclone/flood occurred in the area of the project developer and affected the plant is not justified. The claim of force majeure requires to be proved by the Petitioner with necessary documents and evidences with consideration of provisions of the PPA wherein the Petitioner (power producer) is under obligation to select proper site of the solar power plant, geographical condition for construction of plant, its design and to operate the project with prudent practice wherein all necessary aspects like appropriate plant design consist of survey of the place, area, rainfall, flood situation, level of the plant, water level, earlier cyclone condition, flood condition, rainfall in the area/place etc. required to be observed while deciding the plant designing and commissioning of the project. Moreover, the technical parameter condition etc., selection of material, construction works, practices for installation of the power plants equipment needs to be followed by the project developer with consideration of life of plant as 25 years and its need to ensure by the power producer. In absence of the same, it is not acceptable that force majeure event due to cyclone/flood has happened and affected the plant of the Petitioner.

9.73 We also note that the Petitioner has not approached the Commission immediately after the Respondent had restrained the Petitioner from replacement of modules etc. on the date of force majeure event claimed by it. Similarly, the Petitioner has also not approached the Commission when the force majeure event occurred, for extension of period of PPA

as claimed in the Petition. Further the Petitioner had not issued any notice with regard to the force majeure occurred at the Petitioner Plant and affect the Petitioner to perform its obligation under the PPA and the Respondent has restrained from it. As the Respondent had not received any notice of force majeure, it is not possible for it to verify as to whether force majeure event had been occurred or not and what is its impact on the Plant. Further in absence of issuance of force majeure event notice by the Petitioner in terms of the PPA as agreed by the Petitioner, which is not followed by the Petitioner. Considering the above, the claim of the Petitioner of occurrence of the Force majeure event during FY 2016-17 is not acceptable and the same is rejected. We also note that there are no documents/evidences on record to specify that the Respondent has at relevant time of force majeure event as claimed by the Petitioner restrained to replace and installed solar PV modules and inverter merely raising this issue in the present Petition after 3 to 4 years. It is not permissible and acceptable to allow the Petitioner plea for occurrence of Force Majeure event and on that ground allow extension PPA terms.

9.74 Now we deal with prayer of the Petitioner that the Respondent to maintain and publish reactive energy account (VAR Charges), in support of renewable energy generation in accordance with the clause 11.61 of the GERC (Grid code) in same manner as applicable to the other constituent is concerned. During the hearing, the Petitioner has neither pressed for the said relief nor pleaded with the grounds for

the said relief. Hence, the same is not considered and not allowed.

9.75 We decide that the action of the Respondent, GUVNL, of issuance of communication letter dated 10.12.2020 is illegal, arbitrary and deserves to be quashed and set aside. Hence, the same is quashed and set aside.

9.76 Now we deal with issue with regard to capacity of plant permissible at Petitioner's project.

9.77 We note that the PPA executed between the parties provides the capacity of plant is 5 MW as per the recital and definition of the PPA which are reproduced below.

“WHEREAS, the Government of Gujarat through letter dated 14.10.2010 has allocated 5 MW capacity to Power Producer for developing and setting up Solar Photovoltaic based power project in the State of Gujarat.

AND, WHEREAS the Power Producer desires to set-up such Solar Photovoltaic Grid Interactive Power Plant of 5 MW capacity at Village- Chadiyana, Taluka- Santalpur, District- Patan using new Solar Photovoltaic Grid Interactive power plants to produce the Electric Energy and exercised the option under aforesaid regulations, for sale of entire electrical energy, so produced, for commercial purposes from such Project to GUVNL.

AND, WHEREAS, the Power Producer has taken responsibility to deliver power at dead end tower in the switchyard of the Solar Photovoltaic based power project and also approach Gujarat Energy Transmission Corporation Limited GETCO for arranging for transmission system for evacuation of power from the project at appropriate voltage level as requirement of the system.

AND, WHEREAS the GUVNL agrees to purchase such power with Discom wise share to be decided from time to time in accordance with Gujarat Electricity Regulatory Commission (power procurement from renewable sources) Regulations, notified from time to time.

NOW THEREFORE IN VIEW OF THE FOREGOING PREMISES AND IN CONSIDERATION OF THE MUTUAL COVENANTS AND CONDITIONS HEREINAFTER SET FORTH, GUVNL AND THE POWER PRODUCER, EACH TOGETHER WITH THEIR RESPECTIVE SUCCESSORS AND PERMITTED ASSIGNS, A PARTY AND COLLECTIVELY THE PARTIES, HEREBY AGREE AS FOLLOWS:"

".....

Project" means a Solar Photovoltaic Grid Interactive Power Station to be established by the Power Producer at Village- Chadiyana, Taluka-Santalpur, District- Patan in the State of Gujarat comprising of 4 numbers of units with an individual installed capacity of 1.25 MW and a total installed capacity of 5 MW shall include land, buildings, plant, machinery, ancillary equipment, material, switch-gear, transformers, protection equipment and the like necessary to deliver the Electricity generated by the Project to the GUVNL at the Delivery Point.

....."

9.78 Further the GEDA certificate dated 5.03.2012 and 9.05.2012 also states that the capacity of the solar power plant of the Petitioner is 5 MW only. The Petitioner has relied on MNRE guidelines wherein it is stated that the solar generator is eligible to set up the plant capacity with D.C modules additional capacity and supply or inject the energy generated from it limited to the power procured from it.

9.79 We note that the provisions of the guidelines of the MNRE are not applicable to the power plant of the Petitioner of the present case due to following reasons:

- a) It is guidelines and not mandatory or statutory provision which is applied on the Petitioner's plant.
- b) The PPA executed between the parties specifically provides the capacity of the solar power plant is 5 MW.
- c) The certificate of commissioning issued by the GEDA is also state capacity of plant 5 MW, as with 58824 Nos. of Solar Modules.
- d) The replacement of solar modules/panels if any, above 5 MW capacity of plant is in contravention of the provision of the PPA because the Tariff Order No. 2 of 2010 dated 29.01.2010 passed by the Commission which also not provides for any additional capacity of solar module by enhancement of D.C. modules capacity to be installed at the plant by generator.

Considering the above we are of view that the claim of the Petitioner that it is entitled to keep the capacity of the plant higher than 5 MW with consideration of MNRE guideline etc. are not admissible and not acceptable and same is rejected.

9.80 During the hearing the Petitioner submitted that the Respondent GUVNL has deducted an amount from monthly bill invoices raised by the Petitioner for the energy supplied by it from the Petitioner plant. The Petitioner has submitted that the Respondent has illegally deducted the amount based

on the base CUF. Hence, the Commission may also decide and direct the Respondent not to deduct any amount from the bill invoices raised by the Petitioner after Replacement of solar modules at the Petitioner plant. The Commission may declare the aforesaid action of the Respondent as illegal.

9.81 Per Contra, the Respondent has contended that the aforesaid issue is beyond the scope of the present Petition. Further, the Respondent has deducted the amount as per the provisions of the PPA read with the guidelines issued by the Respondent. The Petitioner has any grievances, it has to approach the Commission by way of separate Petition.

9.82 We note that the issue raised by the Petitioner with regard to bill invoices raised by the Petitioner for energy supplied by it from the plant to the Respondent. We also note that so far as the issue regarding deduction in bill invoices between the parties is qualify as dispute of billing between the parties under Article 6 of the PPA. We also note that any disputes between the parties with regards to billing dispute be raised by the affected party as per Article 6.6 of the PPA, which is reproduced below:

“6.6 Disputes: In the event of a dispute as to the amount of any Tariff Invoice, GUVNL shall notify the Power Producer of the amount in dispute and GUVNL shall pay the Power Producer 100% of the undisputed amount plus 85% of the disputed amount within the due date provided either party shall have the right to approach the GERC to effect a higher

or lesser payment on the disputed amount. The Parties shall discuss within a week from the date on which GUVNL notifies the Power Producer of the amount in dispute and try and settle the dispute amicably. Where any dispute arising out of or in connection with this agreement is not resolved mutually then such dispute shall be submitted to adjudication by the appropriate Commission under Section 79 or 86 of Electricity Act 2003 and the appropriate Commission may refer the matter to Arbitration as provided in the said provision read with Section 158 of Electricity Act 2003. For dispute beyond the power conferred upon the appropriate Commission, such dispute shall be subject to jurisdiction of High Court of Gujarat. If the dispute is not settled during such discussion then the payment made by GUVNL shall be considered as a payment under protest. Upon resolution of the dispute, in case the Power Producer is subsequently found to have overcharged, then it shall return the overcharged amount with an interest of SBI base rate per annum plus 7% for the period it retained the additional amount, GUVNL./ Power Producer shall not have the right to challenge any Tariff Invoice, or to bring any court or administrative action of any kind questioning/ modifying a Tariff Invoice after a period of three years from the date of the Tariff Invoice is due and payable.”

As per aforesaid provisions whenever, any dispute arising between the power producer and power procurer with regard to bill invoices, it shall require to give notice by the person/power producer/power procurer to opposite parties

who have executed the power purchase agreement. Moreover, 85% of undisputed amount also needs to pay by power procurer to a producer. In the present case the Petitioner has raised the issue with regard to deduction of bill invoices of stating that huge amount is deducted by the Respondent from the monthly bill invoices raised by the Petitioner to the Respondent. We note that there is no document on record regarding aforesaid facts. Hence, the said issue is pre-mature to decide in the present Petition. Further no documentary facts etc. on record. Hence, the said issue is not permissible to decide in this matter.

9.83 We also note that in the present case as the Commission has decided that the Petitioner has right to replace or restore solar PV panels or rooftop panels and achieve CUF of 20% in terms of Order No. 02 of 2010 dated 29.01.2010 as well as tariff accordingly as decided in earlier para of this Order. Further, the Commission has also decided that the guidelines for replacement of solar modules issued by the Respondent is illegal and invalid.

10 In view of the above, the present petition partially succeeds, and we decide as under:

- a) The communication dated 10.12.2020 issued by the Respondent with regard to imposition of “Base CUF” and limiting the tariff/ cost of generation payable to “Base CUF” only is illegal, arbitrary. The Petitioner is eligible to generate and inject the energy from its solar power plant of 5 MW capacity and supply the energy generated from the plant to the Respondent to the limit of 20% CUF.

- b) The Petitioner is eligible to replace defective damaged solar PV modules, invertors etc. at its 5 MW plant. The defective solar modules at the Petitioner's plant are $9510 + 644 + 82 = 10236$ replaceable by the Petitioner.
- c) The total replacement of solar modules capacity shall not exceed 10236×85 Wp work to 870.060 kW.
- d) The Petitioner shall provide the details of replaced solar modules intended with new modules specifying the Sr. no of the modules, R.F.I.D details or capacity of modules, manufacturer technical details etc. to the Respondent. The Respondent along with GEDA is entitled to verify the same at the Petitioner's plant and confirm the same by issuing certificate for it.
- e) The Petitioner is not eligible to enhance the capacity of the plant in any case above 5 MW as per the terms of the PPA.
- f) The Prayer of the Petitioner for extension on initial period of 12 years of PPA out of 25 years is rejected.
11. With this Order, the Petition, along with Interim Application if any, shall stand disposed of.

Sd/-

[S. R. Pandey]
Member

Sd/-

[Mehul M. Gandhi]
Member

Place: Gandhinagar
Date: 17/07/2023