

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Subject: In the matter of petition under Guideline 18 of the Guidelines for Tariff Based Competitive Bidding Process for procurement of power from Grid Connected Solar PV Power Projects issued by the Ministry of Power on 03.08.2017 under Section 63 of the Electricity Act 2003, seeking certain deviations from the aforementioned guidelines for Omkareshwar floating Solar Power Project (Phase-II).

Petition No. 62 of 2022

ORDER

(Date of Order: 4th October' 2022)

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| <p>(1) Rewa Ultra Mega Solar Limited,
Urja Bhawan, Link Road No. 2
Shivaji Nagar, Bhopal (M.P.) - 462016</p> | } | <p>Petitioner No. 1</p> |
| <p>(2) MP Power Management Company Ltd.,
Shakti Bhawan, Rampur, Jabalpur (M.P.) - 482008</p> | } | <p>Petitioner No. 2</p> |

Shri Abhineet Singhania, Advocate and Shri Avaneesh Shukla appeared on behalf of the petitioners.

The petitioners Rewa Ultra Mega Solar Limited (RUMSL) and MP Power Management Company Limited (MPPMCL) have jointly filed the subject petition for approval of certain deviations from the “Guidelines for Tariff Based Competitive Bidding Process for procurement of power from Grid Connected Solar PV Power Projects” (hereinafter referred “the Solar Bidding Guidelines”) issued by the Ministry of Power, Government of India on 03,08,2017. Subsequently, Ministry of Power issued four amendments to the Guidelines on 14th June’ 2018, 3rd January’ 2019, 9th July’, 2019 and 22nd October’ 2019, respectively. The aforesaid deviations are sought in respect of bid process to be initiated for the development of 600 MW floating solar power project (hereinafter referred “Project”) Phase-II in floating solar park at Omkareshwar reservoir in Khandwa District, Madhya Pradesh.

2. The petitioner No. 1 RUMSL is a joint venture company incorporated as a 50:50 share between Solar Energy Corporation of India (SECI) and Madhya Pradesh Urja Vikas Nigam Limited (MPUVNL). RUMSL intends to develop and provide the park infrastructure for Floating Solar Park, and invites developers to bid and develop floating solar power projects at the Floating Solar Park in Madhya Pradesh.
3. The petitioner No. 2, M.P. Power Management Company Limited is a Holding company of distribution companies in the State and it is authorized to procure power on behalf of the distribution licensees from the project and to fulfill their

Renewable Purchase Obligation (RPO).

4. The petitioners have broadly submitted the following:
- 1) *With a view to provide a further boost to renewable energy development in MP and in line with the Ministry of New and Renewable Energy (“MNRE”), Government of India (“GoI”), Scheme for Development of Solar Parks and Ultra Mega Solar Power Project under which RUMSL intends to develop and provide the park infrastructure for Floating Solar Park, and invites developers to bid and develop floating solar power projects at the Floating Solar Park, thereby contributing to the targets envisaged under the Atma Nirbhar MP vision.*
 - 2) *The 600 MW capacity of the Project will be developed in two phases (Phase I and Phase II) with each phase comprising of a maximum of 3 x 100 MW units of floating solar photovoltaic power plants to be set up by the Solar Power Developer(s). The unit capacity in MW will be the maximum power output from the unit that can be scheduled at the delivery point during any time block of the day. Further, RUMSL has also been entrusted with the responsibility to carry out the Bid Process to select suitable solar power generators to develop, operate and maintain the six (6) units (“SPDs”). In this regard, it is stated that the SPDs for the six (6) units will be required to sign separate power purchase agreement(s) (“PPAs”) with solar power park developer i.e. RUMSL and MPPMCL as the Procurer. RUMSL has already initiated the bid process for Phase I (300 MW) of the Project wherein the entire procurement of 300 MW shall be done by MPPMCL through intra-state network. During the process, RUMSL and MPPMCL had sought certain deviations from the Solar Bidding Guidelines from this Commission vide petition no. 12/22. This Commission has accorded approval to all the deviations vide its order dated March 30, 2022. RUMSL is now initiating the bid process for Phase II (3x100 MW) of the Project wherein the entire procurement of 300 MW shall be again done by MPPMCL through intra-state network and the Petitioners are therefore seeking approval on similar deviations from Solar Bidding Guidelines as sought earlier from the Commission for Phase I (3x100 MW).*
 - 3) *It is stated that in situations where the agency signing the PPA is different from the agency conducting the bidding process, under the Solar Bidding Guidelines, the authority carrying out the bidding process on behalf of the Procurer is called the authorized representative of the procurer (“Authorized Representative”). The Authorized Representative is entrusted to fulfill the obligations imposed on the procurer under the Solar Bidding Guidelines. Accordingly, RUMSL, being the solar power park developer, has been designated as the Authorised Representative of the Procurer under the Solar Bidding Guidelines and is responsible for fulfilling all the obligations imposed on the Procurer during the bidding phase.*

- 4) *MPPMCL has been authorized by the 3 (three) distribution licensees to procure power on behalf of them for retail supply to consumers. Therefore, in order to procure power on behalf of the state distribution licensees and to fulfil their RPO, MPPMCL has proposed to procure power from the Project. Further, MPPMCL is also conscious of the stated objective of GoI and GoMP to reduce carbon emissions and to develop sustainable energy solutions for the future.*
- 5) *As aforesaid, the responsibility of the bid preparation and conducting the Bid Process has been entrusted to RUMSL as the Authorised Representative of the Procurer, i.e., MPPMCL. Upon selection of the SPDs, the Procurer would execute separate PPAs with the selected SPDs for each Unit separately. Further, RUMSL, being the solar power park developer, would also be a signatory to the PPAs with a view to ensure timely completion of the ancillary infrastructure for the Floating Solar Park, which is expected to translate into discovery of attractive tariffs under the Bid Process.*
- 6) *It is submitted that for the development of the Project, following agreements will be required to be executed by the SPDs for the development of this Project:*
- (a) separate 'Power Purchase Agreements' with the Procurer (along with the solar power park developer, i.e., RUMSL) to implement the units and for sale by the SPD and purchase by the Procurer the solar energy generated from the units ("PPA");*
 - (b) an 'Implementation Support Agreement' between the SPD and RUMSL, setting out the terms and conditions of use of the internal evacuation infrastructure to be constructed and commissioned by RUMSL for evacuation of power from the unit up to the delivery point and associated facilities in the Floating Solar Park to be provided by RUMSL to the SPDs ("ISA");*
 - (c) a 'Land Use Permission Agreement' with the New and Renewable Energy Department, GoMP and RUMSL, granting SPDs the right to use the land for the construction, operation and maintenance of the unit at the Omkareshwar Floating Solar Park ("LUPA");*
 - (d) a 'Water Use Permission Agreement' with the New and Renewable Energy Department, MP and RUMSL, granting SPDs the right to use the Water Body for the construction, operation and maintenance of the unit at the Omkareshwar Floating Solar Park ("WUPA");*
 - (d) a 'Coordination Agreement' with the SPDs of the respective units in the Floating Solar Park, RUMSL and the Procurer, in relation to, amongst others, scheduling of power between the Procurer and for effective*

construction and operation of the Floating Solar Park (“Coordination Agreement”).

- 7) *It is stated that, under section 63 of the Act, the appropriate commission, which is this Commission in the present case, shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. Section 63 of the Act is excerpted below for convenient perusal:*

“63. Determination of tariff by bidding process:

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

- 8) *Moreover, the National Tariff Policy, 2016 (“Tariff Policy”) formulated by the MoP stipulates that procurement of power by distribution companies from renewable solar PV power projects, above the notified capacity, must be done through a competitive bidding process from a date notified by the Central Government. The relevant provision of the Tariff Policy is set out below for convenient perusal:*

“6.4 Renewable sources of energy generation including Co-generation from renewable energy sources:

(1) ...

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

- 9) *Under Guideline 2.2.1 of the Solar Bidding Guidelines, in case of a single distribution licensee being the Procurer, the Appropriate Commission, for the purpose of Solar Bidding Guidelines, shall be the State Electricity Regulatory Commission of the concerned State where the distribution license is located.*
- 10) *Thus, it is submitted that this Commission is the appropriate commission under Solar Bidding Guidelines and section 63 of the Act for the Bid Process as the procurement under the Bid Process contemplates that MPPMCL will, on behalf of the 3 (three) distribution companies in MP, procure the generated energy from the Project in MP.*
- 11) *Guideline 3.1.1 of the Solar Bidding Guidelines provides that the bidding documents, including the Request for Selection (“RfS”) and the draft power*

purchase agreement, shall be prepared by the procurer in consonance with the Solar Bidding Guidelines and the standard bidding documents (“SBDs”). The said Guideline 3.1.1 further provides that the procurer is required to seek an approval from the appropriate commission for any deviation in the draft RfS, draft power purchase agreement, draft power sale agreement (“PSA”) (if applicable) prepared for the bid process from the Solar Bidding Guidelines and/ or the SBDs. Such approval is to be obtained in accordance with the process described in Guideline 18 of the Solar Bidding Guidelines. However, it is stated that as on the date of filing of the present Petition the GoI is yet to notify the SBDs under the Solar Bidding Guidelines.

- 12) *The Solar Bidding Guidelines contemplate that till the time the GoI notifies the SBDs, the procurer may prepare draft RfS, draft power purchase agreement, draft PSA and other project agreements with detailed provisions that are consistent with the Solar Bidding Guidelines, and that such detailing will not be considered as deviations from the Solar Bidding Guidelines even though such details are not provided in the Solar Bidding Guidelines. Guideline 3.1.1 of the Solar Bidding Guidelines is excerpted below for convenient perusal (emphasis supplied):*

“3.1. Conditions to be met by Procurer:

The Procurer shall meet the following conditions:

3.1.1. Bid Documentation:

- a) *Prepare the bid documents in accordance with these Guidelines and Standard Bidding Documents (SBDs) [consisting of Model Request for Selection (RfS) Document, Model Power Purchase Agreement and Model Power Sale Agreement], notified by the Central Government, **except as provided in sub clause (c) below.***
- b) *Inform the Appropriate Commission about the initiation of the bidding process.*
- c) *Seek approval of the Appropriate Commission for deviations, if any, in the draft RfS draft PPA, draft PSA (if applicable) from these Guidelines and/ or SBDs, in accordance with the process described in Clause 18 of these Guidelines.*
 - i. *However, till the time the SBDs are notified by the Central Government, for purpose of clarity, if the Procurer while preparing the draft RfS, draft PPA, draft PSA and other Project agreements provides detailed provisions that are consistent with the Guidelines, **such detailing will not be considered as deviations from these Guidelines even though such details are not provided in the Guidelines.***

ii. ...”

- 13) *In accordance with the aforesaid provisions of the Act and the Tariff Policy, the Bid Process shall be conducted through a competitive bidding process and as per the provisions of the Solar Bidding Guidelines.*

Deviations from the Solar Bidding Guidelines

- 14) *As stated above, the Gol is yet to notify the SBDs. Accordingly, in terms of Guideline 3.1.1 of the Solar Bidding Guidelines, RUMSL will be preparing the bidding documents and the project agreements for the Bid Process, namely, the request for proposal (“RfP”), PPA, LUPA, WUPA, ISA and Coordination Agreement, in accordance with the provisions of the Solar Bidding Guidelines, to the extent applicable to the project specific characteristics of the Bid Process. However, in order to make the Project more bankable, financially viable and in order to obtain competitive tariffs from the bidders participating in the Bid Process, certain project specific deviations are required to be made from the Solar Bidding Guidelines. As stipulated in Guideline 3.1.1 of the Solar Bidding Guidelines, procurers may deviate from the Solar Bidding Guidelines in accordance with the provisions of Guideline 18 of Solar Bidding Guidelines. Guideline 18 of the Solar Bidding Guidelines is excerpted below for convenient perusal:*

“18. DEVIATION FROM PROCESS DEFINED IN THE GUIDELINES

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

- 15) *Accordingly, the present Petition has been filed seeking approval for certain bid specific deviations from the Solar Bidding Guidelines proposed to be set out in detail in the project agreements and bidding documents. Additionally, it is pertinent to note that all the relevant stakeholders in the Project (especially RUMSL and the Procurer) have engaged in constant discussions and deliberations in relation to the proposed deviations and formulating a suitable contract structure for this Project.*
- 16) *It is submitted that in a similar petition filed with the Hon’ble Central Electricity Commission (“CERC”) bearing petition no. 91/MP/2020 in the matter of Rewa Ultra Mega Solar Limited, Madhya Pradesh Power Management Company Limited, for Agar Solar Park (550 MW), the Hon’ble CERC had allowed certain deviations vide its order dated April 25, 2021 (“CERC Order”). The Hon’ble CERC had also allowed similar deviation approvals in matters related to petition filed for Agar Solar Park (550 MW), Shajapur Solar Park (450 MW) and Neemuch Solar Park (500 MW). RUMSL was the Authorized Representative for all the above three bid processes. It is further submitted that in the petition filed with Hon’ble Madhya Pradesh Electricity Regulatory Commission (“MPERC”) bearing petition no. 12/2022, in the*

matter of Rewa Ultra Mega Solar Limited, Madhya Pradesh Power Management Company Limited, for Phase I of the Project, the Commission has allowed all the deviations sought therein vide its order dated March 30, 2022 (“MPERC Order”). The Petitioners further submit that the deviations allowed by the MPERC Order and the justifications for those deviations are common with the deviations sought in the present petition. The deviations, which the Petitioners are requesting for and the MPERC Order thereon are set out hereunder for the kind consideration and approval of this Commission.

- 17) *Because of project specific requirements, following deviations are required from the Standard Bidding Guidelines:*
- I. Notification of force majeure event.*
 - II. Off- take Constraints due to lack of readiness of transmission/power evacuation infrastructure.*
 - III. SPD Event of default and consequences thereof.*
 - IV. Event of default on account of SPD’s failure to supply energy as per PPA .*
 - V. Inclusion of "Epidemic, Pandemic, Quarantine, Lockdown or similar action ordered by any government authority" as Force Majeure Events .*
 - VI. Termination due to a Non-Natural Force Majeure Event.*
 - VII. Commissioning Timelines.*
 - VIII. Event of reservoir min. water level going below 190.5m.*
- 18) *It is therefore submitted that this Commission has the jurisdiction to approve the aforesaid deviations from the Solar Bidding Guidelines under Guideline 18 of the Solar Bidding Guidelines.*

5. With the aforesaid submission, the petitioners has made the following prayer:

“Grant approval to the afore-mentioned deviations from the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects proposed to be included in the draft RfP and draft PPAs for the bid process initiated for development of Phase II (300 MW) of the total 600 MW Omkareshwar floating solar project in Khandwa District, MP;”

6. Motion hearing in the subject matter was held on 27.9.2022 wherein Ld. Counsel who appeared for the petitioner No.1 submitted that RUMSL has been entrusted with responsibility to carry out the Bid Process to select suitable solar power generators to develop, operate and maintain 600 MW Omkareshwar floating solar power project in two phases. RUMSL is initiating the bid process for Phase II (300 MW) of the aforesaid Project wherein the entire procurement of 300 MW power shall be done by MPPMCL through intra-state network. However, after going through the guidelines for “Tariff Based Competitive Bidding Process for procurement of power from Grid Connected Solar PV Power Projects”, the petitioner No. 1 wishes to make

certain changes in the Standard Bidding Documents in order to make the project more bankable, financially viable and to make the bidding process more competitive.

7. The petition was admitted and matter was reserved for order on the issue of seeking deviations from the Guidelines for “Tariff Based Competitive Bidding Process for procurement of power from Grid Connected Solar PV Power Projects”. In the daily order dated 29.09.2022, it was mentioned that the additional information/documents required in this matter shall be communicated to the petitioner shortly.

Statutory and Regulatory provisions:

8. On perusal of the contents under the subject petition, the Commission observed that in accordance to the mandate of Section 63 of the Electricity Act, 2003 and the Tariff Policy, Ministry of Power, has issued the Solar Bidding Guidelines on 03.08.2017, which have been further amended vide notifications issued by the Ministry of Power dated 14.06.2018, 03.01.2019, 09.07.2019, 22.10.2019 and 25.09.2020. The Solar Bidding Guidelines is applicable for long-term procurement of electricity by Procurers from grid-connected Solar PV power projects having a size of 5 MW and above.
9. The Solar Bidding Guidelines have been issued with the objectives of promoting and enabling competitive procurement of electricity from solar PV power plants by distribution licensees to protect consumer interests, to facilitate transparency and fairness in the procurement process, and to provide standardization and uniformity in the procurement process and a risk sharing framework between various stakeholders involved in the solar PV power procurement, thereby encouraging investments, enhancing bankability of projects and profitability for investors.
10. Section 63 of the Electricity Act stipulates as under:

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

11. Tariff Policy, 2016 has specific provision on the purchase of power generated from renewable energy sources. Clause 6.4(2) of the Tariff Policy, 2016 provides as under:

“States shall endeavor to procure power from renewable energy sources through competitive bidding to keep the tariff low, except from the waste to energy plants. Procurement of power by Distribution Licensee from renewable energy sources, from Solar PV Power Projects above the notified capacity,

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

12. The petitioners have submitted that as stipulated in clause 3.1.1 of the Solar Bidding Guidelines, Procurers may deviate from the Solar Bidding Guidelines in terms of the provisions of Clause 18 of the Solar Bidding Guidelines. Some relevant clauses of the Solar Bidding Guidelines are as under:

(i) Clause 3.1.1 of the Solar Bidding Guidelines is stated as under:

“3.1. Conditions to be met by Procurer:

The Procurer shall meet the following conditions:

3.1.1. Bid Documentation:

- a) *Prepare the bid documents in accordance with these Guidelines and Standard Bidding Documents (SBDs) [consisting of Model Request for Selection (RfS) Document, Model Power Purchase Agreement and Model Power Sale Agreement], notified by the Central Government, except as provided in sub clause (c) below.*
- b) *Inform the Appropriate Commission about the initiation of the bidding process.*
- c) *Seek approval of the Appropriate Commission for deviations, if any, in the draft RfS draft PPA, draft PSA (if applicable) from these Guidelines and/ or SBDs, in accordance with the process described in Clause 18 of these Guidelines.*

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

(ii) Regarding the deviation from standard bidding guidelines, the Clause 18 of the Solar Bidding Guidelines is stated as below:

“18. Deviation from Process Defined in the Guidelines

*In case there is any deviation from these Guidelines and/or the SBDs, the same shall be **subject to approval by the Appropriate Commission. The Appropriate Commission shall approve or require modification***

to the bid documents within a reasonable time not exceeding 90 (ninety) days.”

- (iii) The petitioners submitted that this Commission is the appropriate commission under Section 63 of the Electricity Act, 2003 and Clause 2.2 of the Solar Bidding Guidelines for the Bid Process as the procurement under the Bid Process contemplates a procurement where the distribution licensees are located in 1 (one) state. Clause 2.2 of the Solar Bidding Guidelines stipulates as under:

“2.2. Appropriate Commission:

2.2.1. *Subject to the provisions of the Act:*

- a. ***In case of a single distribution licensee being the Procurer, the Appropriate Commission, for the purpose of these bidding Guidelines, shall be the State Electricity Regulatory Commission of the concerned State where the distribution license is located.***
- b. *In case of combined procurement where the distribution licensees are located in more than one State, the Appropriate Commission for the purpose of these bidding Guidelines, shall be the Central Electricity Regulatory Commission.*
- c. *For cases involving sale of power from Central Generating Stations, the Appropriate Commission shall be the Central Electricity Regulatory Commission.”*

Commission’s observation and finding:

13. The subject Petition has been filed jointly by the petitioners RUMSL and MPPMCL seeking approval for certain bid specific deviations from the Solar Bidding Guidelines proposed to be set out in detail in the project agreements and bidding documents. Regarding the proposed deviations, the petitioners submitted that all the relevant stakeholders in the Project (especially RUMSL and the Procurer) have engaged in constant discussions and deliberations in relation to the proposed deviations and formulating a suitable contract structure for this Project. Therefore, the proposed deviations are being sought from this Commission after discussions with various relevant stakeholders, including officials of the New and Renewable Energy Department, GoMP.
14. The petitioners have sought approval of the Commission to eight deviations from the Solar Bidding Guidelines viz. Notification of force majeure event, Off-take Constraints due to lack of readiness of transmission/power evacuation infrastructure, SPD Event of default and consequences thereof, Event of default on account of SPD’s failure to supply energy as per PPA, Inclusion of "Epidemic, Pandemic, Quarantine, Lockdown or similar action ordered by any government authority" as Force Majeure Events, Termination due to a Non-Natural Force

Majeure Event, Commissioning Timelines and Event of Reservoir minimum water level going below 190.5M.

15. The detailed analysis of the aforesaid deviations from standard bidding guidelines for which the petitioners have sought approval of the Commission in the subject Petition are as under:

I. **“Notification of force majeure event:**

Petitioner’s Submission:

- (i) *Clause 5.4.4 of the Solar Bidding Guidelines requires that the affected party shall notify the other party of the force majeure event, as soon as reasonably practicable, but not later than seven (7) days after the affected party knew or ought to have reasonably known of the occurrence of the force majeure event. The deviation from this guideline was sought by providing a maximum period of fifteen (15) days in place of seven (7) days to notify the other party of the occurrence of force majeure event as seven (7) days may not be adequate for the affected party to notify all the effects of force majeure event.*
- (ii) *The MPERC in Para 19 of the MPERC Order dated 30.03.2022 allowed the aforesaid deviation.*
- (iii) *Accordingly, it is prayed that this Commission may be pleased to again allow such a deviation from the Solar Bidding Guidelines and include provisions in the project agreements for the affected party to notify the other party of the occurrence of a force majeure event, as soon as reasonably practicable, but not later than 15 (fifteen) days after the affected party knew or ought to have reasonably known of the occurrence of such event.*

Commission’s Observations:

16. Regarding the Force Majeure Event, Clause 5.4.4 of the Solar Bidding Guidelines stipulates as under:

“5.4.4. Notification of Force Majeure Event

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

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

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

17. Aforesaid clause of the Solar Bidding Guidelines provides that if the performance of any of the parties under the project agreements is affected due to a force majeure event, the affected party shall notify the other party of such an event, as soon as reasonably practicable, but not later than seven (7) days after the affected party knew or ought to have reasonably known of the occurrence of the force majeure event.
18. The petitioners have submitted that the affected party should be provided with a maximum period of fifteen (15) days in place of seven (7) days to notify the other party of the occurrence of force majeure event as seven days may not be adequate for the affected party to notify all the effects of force majeure event.
19. The petitioners have stated that the Commission vide order dated 30th March' 2022 had also allowed similar deviation for phase-I of this project developed by the same petitioners in MP.
20. The Commission noted that the petitioners intend to allow more time i.e., fifteen (15) days for giving notice on occurrence of force majeure event. As the intent of the deviation being sought is to allow sufficient time to notify effects of force majeure incidence, therefore, this deviation providing a maximum period of fifteen (15) days in place of seven (7) days is considered.

II. Off-take Constraints due to lack of readiness of transmission/power evacuation infrastructure

Petitioner's Submission:

- i. *Guideline 5.5.1 (a) of the Guidelines stipulate that if after the scheduled commissioning date, the plant is ready but the necessary power evacuation/transmission infrastructure is not ready, for reasons not attributable to the Solar*

Power Generator, leading to off-take constraint, the generation compensation shall be payable in the manner provided as below;

“The normative CUF of 19% (nineteen per cent) or committed CUF, whichever is lower, and in cases where the contract is in energy terms, proportionate value of CEQ, for the period of grid unavailability, shall be taken for the purpose of calculation of generation loss. Corresponding to this generation loss, the excess generation by the SPD in the succeeding 3 (three) Contract Years, shall be procured by the Procurer at the PPA tariff so as to offset this loss”

- ii. *The Guidelines further state that if the transmission delay is directly attributable to the organization building the transmission network and some penalty is imposed on him, then a part of that penalty may be utilized for compensating the generation loss. The mechanism for compensating the developers will be spelt out in the tender documents.*

In the petition submitted to this Commission, the deviation from the Guidelines was sought by submitting that.

- iii. *Despite all steps being taken for ensuring the readiness of the transmission/power evacuation infrastructure, any delay beyond the scheduled commissioning date of a unit for reasons not attributable to the SPD requires a day-to-day extension of the scheduled commissioning date so as to ensure that the PPA term remains unchanged. **It was therefore submitted that the SPDs will be compensated by providing a day-to-day extension to the scheduled commissioning date.***
- iv. *While the Guidelines provide that such excess generation is to be procured by the Procurer in the succeeding three (3) years, there may be a scenario wherein the SPD does not have enough excess generation beyond the guaranteed energy offtake in the succeeding three (3) years to fully compensate the generation loss due to lack of readiness of the evacuation infrastructure, especially since with time solar panels undergo performance degradation, and therefore, may not produce enough excess electricity to compensate the generation loss. **It was therefore submitted that the SPDs will be compensated by off-take of excess generation beyond the guaranteed energy offtake in the remaining term of the PPA by the procurer until it is fully compensated for the generation loss.***
- v. *A long stop date is proposed to be set out in the PPAs, post which, if the transmission/ power evacuation infrastructure is not ready, the SPDs will have a right to terminate the PPA and other project agreements on account of RUMSL's failure to make available the transmission/ power evacuation*

- infrastructure by the long stop date. It was therefore submitted that if the transmission/power evacuation infrastructure is not ready even after the long stop date (proposed to be set out in the PPAs), then the SPDs will have a right to terminate the PPAs and other project agreements on account of RUMSL's failure to make available the transmission/ power evacuation infrastructure by the long stop date and RUMSL shall be liable to refund all charges received from SPDs under the ISA till the termination, including the project development fee (if already paid by the SPDs).*
- vi. *The MPERC in para 23 of the MPERC Order dated 30.03.2022 allowed the aforesaid deviation.*
- vii. *Accordingly, it is prayed that this Commission may be pleased to again allow the deviation from the Guidelines on compensation to be payable to SPD in the following manner by the Procurer in case of transmission/power evacuation unavailability;*
- i. *Providing a day-to-day extension to scheduled commissioning date; and*
 - ii. *Compensation for the generation loss suffered wherein the generation loss shall be computed at the normative CUF of 19% (nineteen per cent) or committed CUF, whichever is lower, and in cases where the contract is in energy terms, proportionate value of committed Minimum Supply Obligation (MSO) in PPA; and*
 - iii. *Mechanism for the compensation for the generation loss computed in pt. ii. above shall be through excess generation beyond the guaranteed energy offtake over the remaining term of the PPA; and*
 - iv. *if the transmission/power evacuation infrastructure is not ready even after the long stop date (proposed to be set out in the PPAs), then the SPDs will have a right to terminate the PPAs and other project agreements on account of RUMSL's failure to make available the transmission/ power evacuation infrastructure by the long stop date and RUMSL shall be liable to refund all charges received from SPDs under the ISA till the termination, including the project development fee (if already paid by the SPDs)*
- viii. *It is submitted that approval of aforesaid deviations similar to that approved by this Commission would result in lowering the bid tariffs received for the Project, as otherwise, bidders would build in a risk premium for this offtake constraint risk, especially considering that this is a risk that cannot be anticipated or assessed. Additionally, this is a risk that may not even fructify, which may lead to the Procurer unnecessarily paying higher tariffs for the entire term of the PPA.*

Commission’s Observations:

21. With regard to Offtake constraints due to Transmission Infrastructure/ Grid Unavailability, clause 5.5.1 (a) of the Solar Bidding Guidelines provide as under:

- a) **Generation Compensation in offtake constraint due to Transmission Infrastructure not complete/ ready (Transmission constraint):** After the scheduled commissioning date, if the plant is ready but the necessary power evacuation/ transmission infrastructure is not ready, for reasons not attributable to the Solar Power Generator, leading to off-take constraint, the provision for generation compensation is as follows:

Transmission Constraint	Provision for Generation Compensation
<i>If the plant is ready but the necessary power evacuation/ transmission infrastructure is not ready, leading to off take constraint</i>	<p>a) The normative CUF of 19% (nineteen per cent) or committed CUF, whichever is lower, and in cases where the contract is in energy terms, proportionate value of CEQ, for the period of grid unavailability, shall be taken for the purpose of calculation of generation loss. Corresponding to this generation loss, the excess generation by the SPD in the succeeding 3 (three) Contract Years, shall be procured by the Procurer at the PPA tariff so as to offset this loss.</p> <p>b) If the transmission delay is directly attributable to the organization building the transmission network and some penalty is imposed on him, then a part of that penalty may be utilized for compensating the generation loss.</p> <p>The mechanism for compensating the developers will be spelt out in the tender documents.</p> <p>Contract Year, shall be as defined in PPA.</p>

However, it is clarified that if the plant is ready before SCOD, but the off-take is constrained because of inadequate/ incomplete power evacuation infrastructure, no compensation shall be permissible.”

22. The petitioners submitted that in case there is delay in readiness of transmission/power evacuation infrastructure beyond the scheduled commissioning date of a unit, then the petitioners/ procurers will compensate SPDs in the following way:

- i. Firstly, the SPDs will be compensated by providing a day-to-day extension to the scheduled commissioning date;
 - ii. Secondly, the SPDs will be compensated by the Procurers for the generation loss suffered;
 - iii. Thirdly, the SPDs will be compensated by off-take of excess generation beyond the guaranteed energy offtake in the remaining term of the PPAs by the procurers until it is fully compensated for the generation loss.
 - iv. Fourthly, if the transmission/power evacuation infrastructure is not ready even after the long stop date (proposed to be set out in the PPAs), then the SPDs will have a right to terminate the PPAs and other project agreements on account of RUMSL's failure to make available the transmission/ power evacuation infrastructure by the long stop date and RUMSL shall be liable to refund all charges received from SPDs under the ISA till the termination, including the project development fee (if already paid by the SPDs).
23. The petitioners have stated that earlier vide order dated 30th March' 2022, the Commission had also allowed similar deviation for Phase-I of the same project developed by the same petitioners in MP.
24. The Commission observed that the intent of the proposed changes in connection with generation compensation in the event of transmission infrastructure constraint is to provide greater certainty to investors. The certainty and comfort as sought to be provided through this deviation are likely to yield more efficient price discovery and would be in the interest of the consumers. Therefore, the Commission acknowledges the intent and considered the deviation in Generation Compensation in offtake constraint due to Transmission Infrastructure not complete/ ready as sought in this order.

III. SPD Event of default and consequences thereof

Petitioner's Submission:

- i. *Guideline 5.6.1 (a) of the Solar Bidding Guidelines provides for the events to be construed as SPD's event of default while 5.6.1 (b) of the Guidelines mentions about the liability of SPD to pay to the Procurer, damages, as provided in the Guidelines. Meanwhile 5.6.1 (c) of the Guidelines mention that in the event the lenders are unable to substitute the defaulting Solar Power Generator within the stipulated period, the Procurer may terminate the PPA and acquire the Project assets for an amount equivalent to 90% of the debt due, failing which, the lenders may exercise their mortgage rights and liquidate the Project assets.*

- ii. *In the petition submitted to this Commission, it was submitted that as per the Guidelines, MPPMCL shall have the right to pay to the SPDs termination compensation equal to ninety percent (90%) of debt due, upon payment of which, the SPDs will transfer the unit to MPPMCL.*
- iii. *It was further submitted that if MPPMCL chooses not to exercise this right, then RUMSL/ its nominee will have the right to pay the same termination compensation as payable by MPPMCL to acquire the unit and RUMSL/ its nominee shall continue to supply power to MPPMCL as per terms of the PPA.*
- iv. *It was submitted that if RUMSL chooses not to exercise its rights to acquire the unit and RUMSL has to bear any charges payable on account of relinquishment of long-term access rights as per applicable regulations of the state as a result of the termination of the PPAs, then such charges will be to the SPDs' account.*
- v. *The MPERC in Para 28 of the MPERC Order dated 30.03.2022 allowed the aforesaid deviation.*
- vi. *It is therefore prayed that this Commission may also be pleased to again allow such a deviation from the Solar Bidding Guidelines and allow incorporation of the provision that in case MPPMCL or RUMSL choose not to exercise their rights to acquire the unit and if RUMSL has to bear any charges payable on account of relinquishment of long-term access rights as per applicable regulations of the state or as applicable in the future, as a result of the termination of the PPA, then such charges shall be to the SPD's account.*

Commission's Observations:

25. Regarding the Event of default and consequences thereof, clause 5.6 of the solar bidding guidelines provides as under:

“5.6. Event of Default and the Consequences thereof:

While detailed provisions about the event of default of the concerned parties and its resulting consequences shall be detailed in the SBDs, this clause lays down the broad principles of contractually dealing with the default of the Solar Power Generator and the Procurers (excluding the Intermediary Procurer).

5.6.1. Generator Event of Default and the consequences thereof:

- (a) *In the event the Solar Power Generator is unable to commission the plant within the stipulated period, or fails to supply power in terms of the PPA, or assigns or novates any of its rights or obligations contrary to the terms of the PPA, or repudiates the PPA, or effectuates a change in control or shareholding of its promoters in breach of the provisions of the PPA, or commits any other acts or omissions as laid down in the PPA and is also unable to cure any of the aforesaid within the cure period, as may be provided in the PPA, the Solar Power Generator*

shall be construed to be in default.

- (b) *Upon being in default, the Solar Power Generator shall be liable to pay to the Procurer, damages, as provided in these Guidelines in Clause 14.3 for failure to the commission within stipulated time and Clause 5.2.1(a) for failure to supply power in terms of the PPA. For other cases, pay to the Procurer, damages, equivalent to 6 (six) months, or balance PPA period whichever is less, of charges for its contracted capacity. The Procurer shall have the right to recover the said damages by way of forfeiture of bank guarantee, if any, without prejudice to resorting to any other legal course or remedy.*
- (c) *In addition to the levy of damages as aforesaid, in the event of a default by the Solar Power Generator, the lenders shall be entitled to exercise their rights of substitution, by the substitution agreement provided in the PPA and concurrence with the Procurers. However, in the event the lenders are unable to substitute the defaulting Solar Power Generator within the stipulated period, the Procurer may terminate the PPA and acquire the Project assets for an amount equivalent to 90% of the debt due, failing which, the lenders may exercise their mortgage rights and liquidate the Project assets.*
26. The aforesaid clause under solar bidding guidelines provides the SPD's event of default and liability of SPD to pay to the procurer. The aforesaid clause of the guidelines further provides that in the event of lenders are unable to substitute the defaulting solar power generator within the stipulated period, the procurer may terminate the PPA and acquire the project assets for an amount equivalent to 90% of the debt due, failing which, the lenders may exercise their mortgage rights and liquidate the project assets.
27. The petitioners have submitted that in case the SPDs default and fail to cure it within the prescribed period, including SPDs' failure to commission the unit by the long stop date after expiry of scheduled commissioning date upon payment of liquidated damages, Procurers will have the right to terminate the PPAs. Under such condition SPDs shall be liable to pay damages as per Guideline 5.6.1 of the Solar Bidding Guidelines to the procurer. The petitioners have requested to allow incorporation of the provision that "in case MPPMCL or RUMSL choose not to exercise their rights to acquire the unit and if RUMSL has to bear any charges payable on account of relinquishment of long-term access rights, as per applicable regulations of the state or as applicable in the future, as a result of the termination of the PPA, then such charges shall be to the SPD's account."
28. The petitioners have stated that earlier vide order dated 30.03.2022, the Commission had also allowed similar deviation for Phase-I of this project to be developed by the same petitioners in MP.

29. The Commission observed that the deviations sought on Termination consequences for SPDs default and Termination Consequences for MPPMCL's default under PPAs as detailed above are an attempt at further detailing of the consequences of default and termination. In view of aforesaid, the Commission considered the aforesaid deviation sought in this regard.

IV. Event of default on account of SPD's failure to supply energy as per PPA

Petitioner's Submission:

- i. *Guideline 5.6.1 of the Solar Bidding Guidelines provides that the SPD's failure to supply power as per the power purchase agreement amounts to an SPD event of default and the SPD is also liable to pay damages to the procurer as stipulated in Guideline 5.2.1(a). Guideline 5.2.1(a) of the Solar Bidding Guidelines provides that if the SPD is unable to generate and supply energy equivalent of the contracted capacity then the SPD shall pay penalty for such shortfall as per the terms of the power purchase agreement, subject to a minimum penalty of 25% (twenty-five percent) of the cost of such shortfall at PPA tariff.*
- ii. *The deviation from this guideline was sought by proposing that since the Solar Bidding Guidelines do not provide the trigger event upon which a failure to supply power under the PPA would amount to an SPD event of default, following provision in the bid documents should be incorporated:*
 - a) *that if the SPDs fail to supply energy up to their yearly minimum supply obligation, the SPDs shall be liable for payment of damages (as set out in detail in the PPA);*
 - b) *in the event the SPDs fail to supply energy up to their yearly minimum supply obligation for a continuous period of three (3) contract years, then the Procurer will have the option to:*
 - 1) *treat such failure of the SPD as an SPD event of default and terminate the PPA;*
or
 - 2) *reduce the SPD's yearly minimum supply obligation upon payment of lump-sum damages by the SPD as per the terms of PPA.*
- iii. *to treat the SPD's inability to meet fifty percent (50%) of its minimum supply obligation in the first operational year, for reasons solely attributable to the SPD, as an SPD event of default.*
- iv. *The MPERC in Para 34 of the MPERC Order dated 30.03.2022 allowed the aforesaid deviation.*
- v. *Therefore, it is prayed before this Commission that it may be pleased to again allow such a deviation from the Solar Bidding Guidelines and allow incorporation*

of the aforesaid arrangement in the project agreements as the same will give the parties an option to avoid termination of the PPA and continue with the Project which may be economically beneficial to the stakeholders involved with the Project. Also, termination of the PPA could have an adverse impact (at least for a short-term period) on the RPO fulfillment of the Procurer.

Commission's Observations:

30. Regarding Event of default on account of SPD's failure to supply energy as per PPA, Clause 5.6.1 of the Solar Bidding Guidelines stipulates as under:

"5.6.1. Generator Event of Default and the consequences thereof:

- a) *In the event the Solar Power Generator is unable to commission the plant within the stipulated time period, or fails to supply power in terms of the PPA, or assigns or novates any of its rights or obligations contrary to the terms of the PPA, or repudiates the PPA, or effectuates a change in control or shareholding of its promoters in breach of the provisions of the PPA, or commits any other acts or omissions as laid down in the PPA and is also unable to cure any of the aforesaid within the cure period, as may be provided in the PPA, the Solar Power Generator shall be construed to be in default.*
- b) *Upon being in default, the Solar Power Generator shall be liable to pay to the Procurer, damages, as provided in these Guidelines in Clause 14.3 for failure to commission within stipulated time and Clause 5.2.1(a) for failure to supply power in terms of the PPA. For other cases, pay to the Procurer, damages, equivalent to 6 (six) months, or balance PPA period whichever is less, of charges for its contracted capacity. The Procurer shall have the right to recover the said damages by way of forfeiture of bank guarantee, if any, without prejudice to resorting to any other legal course or remedy.*
- c) *In addition to the levy of damages as aforesaid, in the event of a default by the Solar Power Generator, the lenders shall be entitled to exercise their rights of substitution, in accordance with the substitution agreement provided in the PPA and in concurrence with the Procurers. However, in the event the lenders are unable to substitute the defaulting Solar Power Generator within the stipulated period, the Procurer may terminate the PPA and acquire the Project assets for an amount equivalent to 90% of the debt due, failing which, the lenders may exercise their mortgage rights and liquidate the Project assets".*

31. Clause 5.2.1 (a) of the Solar Bidding Guidelines reads as under:

"5.2.1. Procurement in Power Terms (MW):

In case of procurement in power (MW) terms, the range of Capacity Utilisation Factor (CUF) will be indicated in the bidding documents. Calculation of CUF will

be on yearly basis. In case the project generates and supplies energy less than the energy corresponding to the minimum CUF, the Solar Power Generator will be liable to pay to the Procurer, penalty for the shortfall in availability below such contracted CUF level. The amount of such penalty will be in accordance with the terms of the PPA, which shall ensure that the Procurer is offset for all potential costs associated with low generation and supply of power under the PPA, subject to a minimum of 25% (twenty-five per cent) of the cost of this shortfall in energy terms, calculated at PPA tariff.”

32. From the above, it is observed that the Solar Bidding Guidelines (as amended on 22.10.2019), provide that the SPD's failure to supply power as per the PPAs amounts to an SPD event of default and the SPD is also liable to pay damages to the procurer as stipulated in Clause 5.2.1(a). The aforesaid clause provides that if the SPD is unable to generate and supply energy equivalent of the contracted capacity then the SPDs shall pay a penalty for such shortfall as per the terms of the PPAs, subject to a minimum penalty of twenty-five percent (25%) of the cost of such shortfall at PPA tariff. However, the petitioners have submitted that the Solar Bidding Guidelines do not provide the event upon which a failure to supply power under the PPA would amount to an SPD event of default. Therefore, the petitioners have proposed to incorporate a provision that if the SPDs fail to supply energy up to their yearly minimum supply obligation, the SPDs shall be liable for payment of damages. Further, in the event the SPDs fail to supply energy up to their yearly minimum supply obligation for a continuous period of three contract years, then the Procurers will have the option to treat such failure of the SPD as an SPD event of default and terminate the PPA; or reduce the SPD's yearly minimum supply obligation upon payment of lump-sum damages.
33. In addition, the petitioners have proposed to treat the SPD's inability to meet its minimum supply obligation fifty percent (50%) in the first operational year, as an SPD event of default.
34. The petitioners have stated that vide order dated 30.03.2022, the Commission had also allowed similar deviation for Phase-I of this project to be developed by the same petitioners in MP.
35. The Commission observed that the intent of the proposed changes in connection with the termination consequences proposed by the petitioners, is to give the parties an option to avoid termination of the PPAs and continue with the Project which may be economically beneficial to the stakeholders associated with the Project. Also, termination of the PPA might have an adverse impact (at least for a short-term period) on the RPO fulfillment of the Procurers. The Commission acknowledges the intent and considered the deviation sought in this regard.

V. **Inclusion of "Epidemic, Pandemic, Quarantine, Lockdown or similar action ordered by any government authority" as Force Majeure Events**

Petitioner's Submission:

- i. *Guideline 5.4.2.1 of the Solar Bidding Guidelines, defines force majeure and categorizes it into "Natural Force Majeure Events" and "Non-Natural Force Majeure Events". The deviation from this guideline was sought by proposing to include any force majeure event in relation to a widespread occurrence of a disease affecting the construction and/or operation of the solar project and "pandemic and epidemic" and "lockdown, quarantine or similar action ordered by any government authority" should be recognized as Force Majeure Events in the definition of force majeure under the Solar Bidding Guidelines.*
- ii. *The MPERC in Para 39 of the MPERC Order dated 30.03.2022 allowed the aforesaid deviation.*
- iii. *Therefore, it is prayed before this Commission that, in the interest of the Project in question, it may be pleased to again allow such a deviation from the Solar Bidding Guidelines and allow incorporation of the aforesaid in the project agreements.*

Commission's Observations:

36. The petitioners have submitted that the definition of force majeure under the Solar Bidding Guidelines does not specifically include any force majeure event about a widespread occurrence of a disease affecting the construction and/or operation of the solar project to safeguard interest of contracting parties. The petitioners further submitted that "pandemic and epidemic" should be specifically added as one of the Natural Force Majeure Events and "lockdown, quarantine or similar action ordered by any government authority, (including under the occurrence of any force majeure event).
37. Clause 5.4.2.1 of the Solar Bidding Guidelines, as amended vide notification dated 22.10.2019, defines force majeure and categorizes it into "Natural Force Majeure Events" and "Non-Natural Force Majeure Events" as under:
 - 5.4.1 *Definition of Force Majeure: A 'Force Majeure' (FM) would mean one or more of the following acts, events or circumstances or a combination of acts, events or circumstances or the consequence(s) thereof, that wholly or partly prevents or unavoidably delays the performance by the Party (the Affected Party) of its obligations under the relevant Power Purchase Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.*

5.4.2. *Categorisation of Force Majeure Events:*

5.4.2.1. Natural Force Majeure Event

- a) *Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado if it is declared/ notified by the competent state/ central authority/ agency (as applicable), or verified to the satisfaction of Procurer;*
- b) *radioactive contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party;*
- c) *the discovery of geological conditions, toxic contamination or archaeological remains on the Project land that could not reasonably have been expected to be discovered through an inspection of the Project land; or*
- d) *any event or circumstances of a nature analogous to any of the foregoing.*

5.4.2.2. Non-Natural Force Majeure Event:

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

with any condition relating to grant, maintenance or renewal of such Permits or clearance, licence, authorization, as the case may be.

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

38. From the above, the Commission observed that the definition of force majeure under the Solar Bidding Guidelines does not specifically include any force majeure event involving widespread occurrence of a disease affecting the construction and/or operation of the solar project. The petitioners have proposed that "pandemic and epidemic" and "lockdown, quarantine or similar action ordered by any government authority" should be recognized as Force Majeure Events under relevant headings so as to safeguard the interests of the contracting parties, under such unprecedented events.
39. The petitioners have stated that the Commission vide order dated 30.03.2022 had also allowed similar deviation for Phase-I of this project to be developed by the same petitioners in MP.
40. The Commission observed that the intention behind the identification of events as 'Force Majeure' is to factor in the circumstances that are not within the reasonable control of the Affected Party. The Commission further observed that COVID 19 outbreak led to a lockdown situation in the entire industry affecting the entire activities. However, the Commission is of the view that the expression 'pandemic' or 'epidemic' without a qualification defining inability of the project developer to execute the project would be too open a position and needs to be restricted to 'pandemic resulting in lockdown or similar action ordered by any government authority'. Accordingly, this deviation is considered with limited scope with modification, namely, 'pandemic resulting in lockdown or similar action ordered by any government authority'.

VI. Termination due to a Non-Natural Force Majeure Event

Petitioner's Submission:

- i. *Guideline 5.4.8.2(a) of the Solar Bidding Guidelines stipulates that upon the occurrence of a Non-Natural Force Majeure Event, the solar power generator will be entitled to terminate the power purchase agreement after the expiry of one hundred and eighty (180) days from the date of issuance of the notice for such force majeure event. Further, Guideline 5.4.8.2(b)(i) of the Solar Bidding Guidelines provides that, as a consequence of the aforesaid termination, the procurer will be obligated to take-over the unit assets by paying to the solar power generator an amount equivalent to one hundred percent (100%) debt due and one hundred and ten percent (110%) adjusted equity.*

- ii. *The deviation from this guideline was sought on the ground that since a period of one hundred and eighty (180) days, as prescribed under the Solar Bidding Guidelines, may not be sufficient for the SPDs to revive the projects to the extent possible before exercising its right to terminate for prolonged non-natural force majeure event, therefore, upon the occurrence of a Non-Natural Force Majeure Event, the SPDs should be entitled to terminate the project agreements after the expiry of three hundred and sixty-five (365) days from the date of issuance of the notice for such force majeure event and not one hundred and eighty (180) days, as prescribed under the Solar Bidding Guidelines.*
- iii. *The MPERC in Para 44 of the MPERC Order dated 30.03.2022 allowed the aforesaid deviation.*
- iv. *Accordingly, it is prayed that this Commission may be pleased to again allow such a deviation from the Solar Bidding Guidelines and include provisions in the project agreements for the SPD to be entitled to terminate the project agreements upon expiry of 365 (three hundred and sixty-five) days from the date of issuance of the notice.*

Commission's Observations:

41. Regarding Termination due to Natural Force Majeure Event, Clauses 5.4.8.1 and 5.4.8.2 of the Solar Bidding Guidelines as per amended notification dated 22.10.2019 stipulates as under:-

“5.4.8.1. Termination due to Natural Force Majeure Event

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

5.4.8.2. Termination due to Non-Natural Force Majeure Event

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

42. The aforesaid Clause 5.4.8.2(a) of the Solar Bidding Guidelines (as amended vide notification dated 22.10.2019) stipulates that upon the occurrence of a Non-Natural Force Majeure Event, the solar power generator will be entitled to terminate the power purchase agreement after the expiry of one hundred and eighty (180) days from the date of issuance of the notice for such force majeure event. Further, Clause 5.4.8.2(b)(i) of the Solar Bidding Guidelines provides that, as a consequence of the aforesaid termination, the procurer will be obligated to take-over the unit assets by paying to the solar power generator an amount equivalent to one hundred percent (100%) debt due and one hundred and ten percent (110%) adjusted equity. As mentioned above, in case of an extended Non-Natural Force Majeure Event, SPDs have the sole right to terminate the PPAs, and in such a scenario the procurers are obligated to take over the projects and pay termination compensation to the SPDs.

43. The petitioners have submitted that a period of one hundred and eighty (180) days, as prescribed under the Solar Bidding Guidelines, may not be sufficient for the SPDs to revive the projects to the extent possible before exercising its right to terminate for prolonged non-natural force majeure event. Therefore, the petitioners have proposed that upon the occurrence of a Non-Natural Force Majeure Event, the SPDs should be entitled to terminate the project agreements after the expiry of three hundred and sixty-five (365) days from the date of issuance of the notice for such force majeure event and not one hundred and eighty (180) days, as prescribed under the Solar Bidding Guidelines.

44. The petitioners have stated that the Commission vide order dated 30.03.2022 had also allowed similar deviation for Phase-I of the project to be developed by the same petitioners in MP.

45. From the above, the Commission observed that as per amendment dated

22.10.2019 to the Solar Bidding Guidelines, upon occurrence of a Non-Natural Force Majeure Event, the SPDs will have the right to terminate the PPAs forthwith after the completion of the period of one hundred and eighty (180) Days from the date of the Force Majeure Notice. The petitioners have proposed that the SPDs should be entitled to terminate the project agreements after the expiry of three hundred and sixty-five (365) days from the date of issuance of the notice for such force majeure event and not one hundred and eighty (180) days. The intent behind the proposal is that the period of one hundred and eighty (180) days may not provide sufficient time to the SPDs to revive the projects. Therefore, the deviation sought in this context is considered.

VII. Commissioning Timelines

Petitioner's Submission

- i. Guideline 14.3 of the Solar Bidding Guidelines provides that projects specified to be set up within a solar park shall be commissioned within a period of 15 (fifteen) months from the date of execution of the PPA.*
- ii. During the initial stakeholder interaction with the prospective Bidders for Phase II, it was discussed and deliberated that a longer commissioning timeframe of 21 (twenty one) months shall enable the Bidders to manage the supply chain-related issues in the present conditions pertaining to availability of solar modules and floats required for project construction and commissioning. This will enable Bidders to enter procurement contracts with better rates and also seek reduced interest cost for financing the project. This would further necessitate reduction in the quoted tariffs by the prospective Bidders. A schedule more than 15 months also augurs well in ensuring the required evacuation infrastructure for the Project to be completed prior to/within the stipulated time.*
- iii. In view of the above, it is prayed that this Commission may be pleased to allow the prescribed commissioning timelines to be extended to 21 (twenty-one) months from the date of execution of PPA to ensure addressal of supply chain related constraints for floating solar project, further improve the bankability of the project and help in lowering the bid tariff for the project.*
- iv. Accordingly, it is prayed that this Commission may be pleased to again allow the deviations listed hereinabove in Para 20 as the same are common with the deviations allowed by the MPERC in its Order dated 30.03.2022 along with the additional deviation sought above for Phase II for an extension in commissioning timeline.*

- v. *It is submitted that the aforesaid deviations from the Solar Bidding Guidelines are imperative to attract competent bidders and to make the Project more bankable and financially viable to obtain most competitive yet viable tariffs.*

Commission's Analysis

46. According to Guideline 14.3 of the Solar Bidding Guidelines, projects designated to be installed inside a solar park must be operational within 15 (fifteen) months of the PPA's execution.
47. The petitioner submitted that during the stakeholder interaction with the prospective Bidders for Phase II, it was decided that a longer commissioning timeframe of 21 (twenty one) months will allow the bidders to manage supply chain-related issues in the current conditions pertaining to availability of solar modules and floats required for project construction and commissioning. This will give bidders an opportunity to negotiate procurement agreements with better terms and seek lower interest costs for project finance. Further, this would require potential bidders to lower their quoted tariffs. Further, a timetable longer than 15 months is also encouraging for assuring that the project's evacuation infrastructure will be finished earlier than or on schedule.
48. In light of the foregoing discussions, this Commission grants the requested extension of the commissioning timelines to 21 (twenty-one) months from the date of PPA execution in order to address supply chain-related challenges for the floating solar project which will further enhance the project's bankability and assist in reducing the bid tariff for the project.

VIII. Event of Reservoir Min. Water Level Going Below 190.5M:

Petitioner's Submission:

- i. *The Omkareshwar Reservoir's FRL (Full Reservoir Level) till 2017, was maintained at 193 Metres. In 2017, the Supreme Court allowed the FRL to be increased to 196.6 Metres. Subsequently the FRL was increase to 196.6 Metres and the Minimum Draw Down Level (MDDL) was increased to 193.6 Metres. Since 2019, when the MDDL level of 193.6 Metres was achieved, there have been no recorded instances of the water level dropping below 193.6 metres. There are two reasons for this – upstream of Omkareshwar lies the Indrasagar Dam which is a much larger dam and its discharge is always controlled in such a way to maintain the water levels in Omkareshwar Dam. At the same time, NHDC (which also operates Indra Sagar Dam) generates power from Omkareshwar. To ensure generation of power, NHDC maintains the water level above the MDDL i.e. 193.6 metres.*
- ii. *An uninterrupted operation of Omkareshwar Floating Solar Power Plant (FSPV)*

shall be achieved by maintaining the Minimum Water Level (MWL) in reservoir to enable the plant in the floating conditions during the Term of the PPA.

- iii. The technical feasibility studies for the Omkareshwar Floating Solar Project have considered suitable margins to avoid any such eventuality. Water levels observed till date have also been shared with the prospective Bidders.*
- iv. However, Bidders have asked for confirmation from the Petitioners on maintaining the water level above 190.5 m through the entire life of project (25 years) or provide compensation for any generation loss due to damage to the equipment caused by such reduction in water level below 190.5 metres.*
- v. Neither the petitioners nor any relevant authority are/shall be able to provide guarantee/confirmation that the water level in the reservoir shall always be maintained above 190.5 metres for the next 25 years.*
- vi. To address the risk of loss of revenue to the SPD due to damage to the capacity, the Petitioners have agreed to provide the following provision in the PPA and alleviate the risk perceived by the SPD.
“In the event the reservoir minimum water level goes below 190.5 m thereby damaging some modules and/or project structures of Unit Capacity and affecting the generation of energy from the Unit, the SPD shall have either of the following two (2) options:*
 - a) To seek compensation from the Procurer for generation loss corresponding to the damaged capacity assessed after joint inspection by RUMSL, Procurer and the SPD, and re-develop and re-commission the damaged capacity approved by the Consultative Forum without seeking any additional costs from the Procurer or RUMSL;*

OR

 - b) Right for reduction in Unit capacity corresponding to the damaged capacity assessed after joint inspection by RUMSL, Procurer and the SPD and subsequent reduction in Guaranteed Energy Offtake and Minimum Supply Obligation of SPD in PPA.*
- vii. In case SPD exercises option 1 mentioned above and seeks compensation from the Procurer for generation loss corresponding to damaged capacity, RUMSL and/or Procurer with the SPD shall jointly assess the damaged capacity with support from an independent engineer/ consultant, if required, after receiving notification from SPD about the event. Based on the joint assessment, Consultative Forum shall communicate the decision on actual damaged capacity and the time to be given to SPD to reinstall and recommission the same to a*

maximum of ninety (90) Days.

- viii. *The Procurer shall be liable to compensate the SPD for generation loss for the period as communicated by the Consultative Forum which shall not be more than ninety (90) days from the day of occurrence of such an event. In such scenario, Procurer shall be liable for compensation in the form of additional procurement of energy i.e., procurement of energy generated beyond GEO in the remaining term of the PPA at PPA tariff. Provided GEO and MSO for the affected period shall be reduced proportionately to the approved damaged capacity for the Contract Year in which event has occurred.*
- ix. *In case SPD exercises option 2 mentioned above and decided to reduce the Unit capacity, RUMS Land/or Procurer, after receiving notification from SPD about the event, shall assess the damaged capacity with support from an independent engineer/ consultant, if required. Based on the assessment and decision taken by Consultative Forum, the Procurer shall allow the SPD to reduce its the Unit capacity for the rest of the Term of the PPA which will subsequently results in reduction in the Guaranteed Energy Offtake and Minimum Supply Obligation in the PPA corresponding to the damaged capacity for the same Contract Year and subsequent Contract Years. The SPD shall be obligated to dismantle and remove the damaged capacity of the Unit within three (3) months from the decision of Consultative Forum. However, for the avoidance of doubt, there will be no reduction in the Comprehensive Charges mentioned in the Implementation Support Agreement under any of the option sought by SPD.*
- x. *The MPERC has considered aforesaid deviation in Para 47 of the MPERC Order dated 30.03.2022.*
- xi. *It is submitted to the Commission that the above provision, of allowing the SPD to seek compensation for generation or to seek reduction in Unit capacity, is again made a part of this Petition for the sake of information to the Commission.*

Commission's Observations:

49. This clause is added to ensure uninterrupted operation of Omkareshwar Floating Solar Power Plant by maintaining the Minimum Water Level of 190.50M in reservoir to enable the plant in a floating condition during the term of PPA. To address the risk of loss of revenue to the SPD due to damage to the capacity, the Petitioners have proposed to provide the aforesaid provision in the PPA to alleviate the risk perceived by the SPD.
50. In order to address the risk of loss of revenue to the SPD, the petitioners have proposed two options in PPA. In the first option, the SPD is liable to seek

compensation from the Procurer for generation loss corresponding to damaged capacity. In second option, SPD shall decide to reduce the unit capacity.

51. The petitioners have stated that the Commission vide order dated 30.03.2022 had also allowed similar deviation for Phase-I of the project to be developed by the same petitioners in MP.
52. The Commission observed that the above provision, of allowing the SPD to seek compensation for loss of generation or to seek reduction in Unit capacity, is in addition to the conditions prescribed in the Solar Bidding Guidelines for providing compensation to the SPD for events defined thereunder. This additional provision is specific to this Omkareshwar Floating Solar Project and is not as a deviation from the Solar Bidding Guidelines. In order to mitigate the risk of solar power developer towards loss of generation below level of 190.50 M, the aforesaid proposed amendment in the PPA in addition to the conditions prescribed in the Solar Bidding Guidelines seems appropriate. The same is considered.
53. In view of aforesaid observations and considering the reasons explained by the petitioners for each deviation, the Commission hereby accords approval for all the eight deviations in the Solar Bidding Guidelines. This approval has been accorded in terms of clause 18 of the Guidelines for Tariff Based Competitive Bidding Process for procurement of power from Grid Connected Solar PV Power Projects notified by Ministry of Power on 03.08.2017 under Section 63 of the Electricity Act 2003. However, approval of PPA/PSA by the Commission shall be necessary in terms of Section 86 (1)(b) of the Electricity Act, 2003 and applicable MPERC Regulations.

Accordingly, Petition No. 62 of 2022 stands disposed of

(Gopal Srivastava)
Member (Law)

(Mukul Dhariwal)
Member

(S.P.S. Parihar)
Chairman